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Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation

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I. INTRODUCTION

In the most widely known court opinion on equal education opportunity, *Brown v. Board of Education*[1], the Supreme Court of the United States emphasized the importance of education as follows:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[2]

Nearly fifty years have passed since the Supreme Court issued its decision in *Brown*, yet many children continue to be deprived of an equal education opportunity. The quoted statement from *Brown* has become the focus for attempts to achieve equal education opportunity through school finance litigation. In this effort to receive an equal education opportunity for students who have been deprived of that right, lawsuits have been commenced in all but 5 of the 50 states. These challenges on the basis of a denial of equal education opportunity to students in the state have moved from a focus on racial discrimination, to the state-created finance formulas that determine how much each school district has to spend on education. Traditionally, the funding formula that provides basic state aid to school districts consists primarily of property taxes imposed at the local level.[3]

The resulting amount provided to each school district is often described as the per-pupil expenditure. The amount available for per-pupil expenditure generally depends upon two main components: (1) the amount contributed to each school district from the state collected revenue and (2) the amount generated from taxable real estate in the local school district. The claim in school finance litigation has been that equalization of educational opportunities requires the establishment of a financing system that does not directly link a district's per

1. 347 U.S. 483 (1954).
2. *Id.* at 493.
3. All states except Hawaii and Michigan rely on local property taxes to support educational funding. Hawaii and the District of Columbia have only one school district. *See generally* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1151 n. 6, 1171 n.169 (1995) [hereinafter Heise, *State Constitutions*]; William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 219 n.2 (1990).

pupil expenditure to its taxable wealth. While in response to claims of denial of equal education opportunity, the states could demonstrate that they had not deliberately configured school districts to maintain racially separate schools and schools that were noticeably inferior if attended by minority students, challengers asserted they could demonstrate that states created financing systems that resulted in an inferior education to students in districts that had less real property wealth than those with more real property wealth. Often the argument was that minority children resided in the property poor districts.[4] The references here to school finance concern education revenue and payments for instruction, support services, and other activities for kindergarten through high school (K-12). This includes the operation of public schools, teachers' salaries, construction of school buildings, the purchase and operation of school buses, and other services.

Claims of lack of equity developed around the theory that all districts should receive a relatively equal level of resources, based on relative need. The need for, and complexities of, school finance reform has been considered by numerous scholars, advocates and economists.[5] Some states attempted to address inequities in school revenue available for per pupil expenditure by creating financing formulas that required examination of the local district funds available for education and then subsidizing each district with funds necessary to provide an education. States have utilized three basic methods to contribute to the support of schools in attempting to correct disparities. First, the state may give flat rate grants of a specified amount on a per-pupil or per-teacher basis regardless of a district's ability to raise funds through the local tax base. Second, the state may enact a foundation program under which the state will provide funds up to a minimum guaranteed level for any district that is unable to raise that level of money through local property taxes assessed at level specified by the state. Third, the state may enact an equalization plan whereby

4. For a discussion of the view that too much reliance may be placed on *Brown v. Board of Education* in school finance litigation since inequities can occur without racial bias, see JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 355-358 (1970). *But cf.* Bruce D. Baker & Preston C. Green, *Can Minority Plaintiffs Use the Department of Education Implementing Regulations to Challenge School Finance Disparities?*, 173 ED. L. REP. 679 (2003); Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 17-18 (2002); Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education is More than Just a Tort*, 96 NW. U. L. REV. 99 (2001); Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1 (2002); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).

5. For an early yet still relevant discussion of the economic theories which led to school finance litigation, see COONS, CLUNE & SUGARMAN, *supra* note 4.

the state guarantees the same amount of money per-pupil to all districts that tax themselves at the same rate.[6] The various configurations of these plans adopted by states often led to property poor districts taxing themselves at a higher rate but still having less educational resources than wealthier districts. This situation precipitated the start of school finance litigation.[7]

In *San Antonio Independent School District v. Rodriguez*,[8] the plaintiffs, a class of Mexican-American parents, challenged the Texas school finance system as violating the Equal Protection Clause of the United States Constitution.[9] They claimed that the Equal Protection Clause established a right to substantially equal funding for all school districts within a given state. Therefore, it was asserted, the state's finance system was unfair and denied an equal education opportunity to students who were poor and resided in school districts with a low property tax base. A successful outcome required a determination that the plaintiffs had a right to an education and that state action either deprived them of that right or substantially burdened it. The constitutional claim in *Rodriguez* was based in large part on the work of Professors John E. Coons, William H. Clune III, and Stephen D. Sugarman. They developed the constitutional and economic analysis for asserting the principle based upon the Equal Protection Clause that: "[t]he quality of public education may not be a function of wealth other than the wealth of the state as a whole."[10] The United States Supreme Court held that even though Texas "virtually concede[d]"[11] that its system of finance failed judicial strict scrutiny, the finance system did not violate the Equal Protection Clause. The Court reasoned that the level of scrutiny required was not strict scrutiny because the finance system, which discriminated on the basis of property wealth, did not work to disadvantage a suspect class or encroach upon a fundamental right. Education was not a fundamental right under the United States Constitution and the system was not "so irrational

6. *See* John E. Coons, William H. Clune III, & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 313-17 (1969); Annette Johnson, *State Court Intervention in School Finance Reform*, 28 CLEV. ST. L. REV. 325, 328-30 (1979). *See* THOMAS B. PARRISH, NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, DEVELOPMENTS IN FUNDING SPECIAL EDUCATION 10 (2002) (reporting funding formulas across the US involving special education in 1999-2000 as pupil weights: 19 states, resource-based: 12 states, flat grant: 11 states, percentage reimbursement: 7 states, and combination: 2), *available at* http://www.csef-air.org/papers/NASDE%20Presentation.pdf.

7. *See* discussion *infra* Part III A.

8. 411 U.S. 1 (1973).

9. U.S CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the law.")

10. COONS, CLUNE & SUGARMAN, *supra* note 6, at 311.

11. 411 U.S. at 16.

as to be invidiously discriminatory."[12] The Court noted that education was not among the rights either explicitly or implicitly found in the text of the Constitution.[13]

Three decades have passed since the 1973 *Rodriguez* decision. During that time, under the belief that challenges to school finance systems based upon the United States Constitution were foreclosed, challengers began to focus on state constitutions as the basis for relief and move from what scholars have referred to as the "first wave" of school finance litigation that relied upon federal rights.[14] The theories used in school finance litigation over the past three decades have been described as occurring in three waves.[15] The first wave litigation that relied on the United States Constitution's Equal Protection Clause began in the 1960s and ended in 1973 with the Supreme Court's decision in *Rodriguez*. The second wave is generally described as beginning in 1973 with the New Jersey Supreme Court decision in *Robinson v. Cahill*,[16] and ending in 1989. The waves are typically described as a first wave consisting of equality claims including reliance upon the Federal Equal Protection Clause of the Fourteenth Amendment, a second of equality claims based upon state equal protection clauses, and the third and present wave of adequacy claims based upon state education constitutional clauses. The legal theories used in the second wave are based on the equal protection clauses of the state constitutions. Second wave equity lawsuits are characterized as seeking substantial equalization of education revenue. The litigation strategy of "third wave" cases focuses upon the educational clauses contained in state constitutions and began in 1989.[17] Third wave adequacy suits are characterized as seeking sufficient resources to provide an adequate education.

Since the Texas school finance formula challenged in *Rodriguez* used a dual approach to collecting revenue to finance education that was much like that used in most states, Federal Equal Protection claims appeared to be foreclosed. Consequently, the subsequent liti-

12. *Id.* at 55.
13. *Id.* at 35.
14. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) [hereinafter Thro, *Judicial Analysis*].
15. *See* Thro, *Judicial Analysis*, *supra* note 14, at 598 n.4; William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222-31 (1990) (describing the first wave as 1971-1973, the second wave as 1973-1989 and the third wave as beginning with the 1989 decisions by the state supreme courts of Montana, Kentucky, and Texas declaring their respective school finance systems as unconstitutional) [hereinafter Thro, *Third Wave*].
16. 303 A.2d 273 (N.J. 1973) (declaring that state constitutional provisions could be the basis for school finance reform).
17. *See* Heise, *State Constitutions*, *supra* note 3; Thro, *Third Wave*, *supra* note 15.

gation[18] began as state equal protection clause claims.[19] Some chal-

18. *See, e.g.*, Alabama Coalition for Equity, Inc. v. Hunt, No. CV- 90-883-R, 1993 WL 204083 (Ala. Cir. Ct. April 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993) (reopened sua sponte and dismissed by the Alabama Supreme Court in *Alabama Coalition for Equity v. Siegelman* on May 31, 2002, *available at* http://www.wallacejordan.com/decisions/Opinions2001/1000951.pdf); Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Kasayulie v. State, 3AN-97-3782 CIV (Alaska Superior Court, Sept. 1, 1999); Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (en banc) (plurality opinion); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Lake View School Dist. No. 25 v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002), *cert. denied*, Wilson v. Huckabee, 123 S.Ct. 2097 (2003); Lake View Sch. Dist. No. 25 v. Huckabee, 10 S.W.3d 892 (Ark. 2000); Lake View v. Huckabee, No. 1992-5318 (Chancery Court, Pulaski County, Ark. May 25, 2001); Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530 (Ark. 1996); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest ("Serrano II"), 557 P.2d 929 (Cal. 1976); Serrano v. Priest ("Serrano I"), 487 P.2d 1241 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill ("Horton III"), 486 A.2d 1099 (Conn. 1985); Horton v. Meskill ("Horton I"), 376 A.2d 359 (Conn. 1977); Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996) (per curiam); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Idaho Schs. for Equal Educ. Opportunity v. State ("ISEEO III"), 976 P.2d 913 (Idaho 1998); Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ. ("ISEEO II"), 912 P.2d 644 (Idaho 1996); Idaho Sch. for Equal Educ. Opportunity by and through Eikum v. Evans ("ISEEO I"), 850 P.2d 724 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); People *ex rel.* Jones v. Adams, 350 N.E.2d 767 (Ill. 1976);:Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Charlet v. Legislature, 713 So. 2d 1199 (La. Ct. App. 1998), *remedial writ denied*, 730 So. 2d 934 (La. 1998), *reconsideration denied*, 734 So. 2d 1221 (La. 1999); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854 (Me. 1995); Montgomery County v. Bradford, 691 A.2d 1281 (Md. 1997); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Milliken v. Green ("Green II"), 212 N.W.2d 711 (Mich. 1973); Milliken v. Green ("Green I"), 203 N.W.2d 457 (Mich. 1972), *vacated by* 212 N.W.2d 711 (Mich. 1973); East Jackson Pub. Schs. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984) (per curiam); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (en banc); Committee for Educ. Equality v. State ("CEE II"), 967 S.W.2d 62 (Mo. 1998) (en banc); Committee for Educ. Equality v. State ("CEE I"), 878 S.W.2d 446 (Mo. 1994) (en banc); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989), *amended*, 784 P.2d 412 (Mont. 1990); State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Gould v. Orr, 244 Neb. 163, 506 N.W.2d 349 (1993) (per curiam); Claremont Sch. Dist. v. Governor ("Claremont III"), 794 A.2d 744 (N.H. 2002); Claremont Sch. Dist. v. Governor ("Claremont II"), 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor ("Claremont I"), 635 A.2d 1375 (N.H. 1993); Abbott by Abbott v. Burke ("Abbott V"), 710 A.2d 450 (N.J. 1998); Abbott v. Burke ("Abbott I"), 495 A.2d 376 (N.J. 1985); Robinson v. Cahill ("Robinson VII"), 360 A.2d 400 (N.J. 1976) (per curiam); Robinson v. Cahill ("Robinson I"), 303 A.2d 273 (N.J. 1973); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647 (N.Y. 1995); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432 (N.C. App. 1987);

lengers were successful with this constitutional argument. However, the mixed results of the "second wave" litigation led others to focus on specific education clauses in the state constitutions and also to alter the nature of the claims from demanding an equal education for all students to that of demanding an adequate education for all students. The change in focus in the litigation has resulted in the description of the "third wave" of litigation by some as a shift from "equity to adequacy."[20] The focus on this shift has led some to reject the vitality of equity claims in favor of adequacy claims.[21]

Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Cincinnati Sch. Dist. Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991) (en banc); Olsen v. State, 554 P.2d 139 (Or. 1976); Withers v. State, 891 P.2d 675 (Or. Ct. App. 1995); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); Danson v. Casey, 399 A.2d 360 (Pa. 1979); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Tenn. Small Sch. Sys. v McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Meno ("Edgewood IV"), 917 S.W.2d 717 (Tex. 1995); Carrollton-Farmers Branch Indep. Sch. Dist. v Edgewood Indep. Sch. Dist. ("Edgewood III"), 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood II"), 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood I"), 777 S.W.2d 391 (Tex. 1989); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Brigham v. State, 692 A.2d 384 (Vt. 1997) (per curiam); Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash. 1978) (en banc); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974) (en banc); State *ex rel.* Bds. of Educ. v. Chafin, 376 S.E.2d 113 (W. Va. 1988); Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); Vincent v. Voight, 589 N.W.2d 455 (Wis. Ct. App. 1998), *petition for review granted*, 602 N.W.2d 758 (Wis. 1999); Lincoln County Sch. Dist. No. 1 v. State, 985 P.2d 964 (Wyo. 1999); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

19. For a listing of the results of the second wave cases, see Baker & Green, *supra* note 4, at 680 n.9 & 10.

20. *See, e.g.*, William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994); Heise, *State Constitutions, supra* note 3; Jonathan R. Werner, *No Knight in Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform in West Virginia*, 35 COLUM. J.L. & SOC. PROBS. 61, 78-79 (2002) (attributing increased plaintiff success in court to the shift in focus from equity to adequacy).

21. For a recent list of decisions by states' highest courts and a designation of victory by the plaintiff or state, see Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1101 n.3 (2000). *See also* ADVOCACY CENTER FOR CHILDREN'S EDUCATIONAL SUCCESS WITH STANDARDS (ACCESS), *at* http://www.accessednetwork.org/statesmain.html (last visited June 8, 2003) (maintaining an updated report and summary of cases). School finance litigation has not been filed in Delaware, Hawaii, Mississippi, and Utah.

A lawsuit was filed in Iowa in April 2002. *Coalition for a Common Cents Solution v. State*, *at* http://www.jefferson-scranton.k12.ia.us/cents/pdf/petition.pdf (last visited June 8, 2003); *see also* Matthew M. Craft, Note, *Lost and Found: The*

This article examines the vitality of equity arguments in lawsuits that include rural school districts. Part II briefly explores the importance of a special consideration of the achievement of equal education opportunity in rural schools. Part III reviews and explains the nature of equity claims as a means to challenge funding formulas that provide basic state aid to school districts and compares the use of adequacy claims as a litigation strategy. This part also argues that there are not three distinct waves of school finance litigation. Part IV addresses the equity based theories in more detail, examines two specific cases, and discusses the implications of these and other cases for future school litigation and reform involving rural school districts. Part V concludes the article.

II. EQUAL EDUCATION OPPORTUNITIES IN RURAL SCHOOL

As the fiftieth anniversary of the *Brown* decision approaches, there are many children who have not achieved an equal education opportunity and many of those children reside in small and rural school districts. They are receiving inadequate and inequitable education opportunities. In *Brown*, the Court noted that attempts to show that schools were "equalized" involved a consideration of a number of "tangible" factors, including buildings,[22] curriculum, and qualifications and salaries of teachers.[23] These factors are often raised in school finance litigation to demonstrate that districts that experience urban poverty and rural conditions are dealing with challenges that are not adequately considered in school finance formulas. This part of the article demonstrates the inequities that exist in funding rural schools and the need for finance reform.

The demand for free public schools developed because, in the early history of the United States, the only children who attended schools were the ones whose parents could pay private tutors. State governments exerted little influence on schools until the passage of common school legislation in the middle decades of the 19th Century. States adopted constitutional amendments to require free or common schools throughout the state, and state legislatures passed implementing leg-

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Unequal Distribution of Local Option Sales Tax Revenue Among Iowa Schools, 88 IOWA L. REV. 199 (2002) (discussing the relevance of the Iowa lawsuit to rural districts); *In the Courts: Iowa Suit Challenges Use of Local Option Sales Tax, Seeks Equitable and Adequate School Funding*, 4 RURAL POLICY MATTERS 7 (2002).

A 1987 lawsuit filed in Indiana, *Lake Central v. State of Indiana*, No. 56 Col-8703-CP-81 (Newton County Cir. Ct., Ind., filed 1987), was withdrawn after the legislature commenced state school finance reform.

22. *See generally* Glen I. Earthman, *School Facility Conditions and Student Academic Achievement,* UCLA INSTITUTE FOR DEMOCRACY, *at* http://repositories.cdlib.org/idea/wws/wws-rr008-1002 (October 1, 2002).

23. *Brown*, 347 U.S. at 491.

islation for support of the schools through general taxation.[24] Throughout the 19th century, education mostly took place in small, ungraded, rural one-room schools. The ungraded schools where a single teacher taught children of different ages, abilities, and levels of knowledge evolved into the graded school of homogeneous classes. Issues of inequity based upon the funding provided to establish and maintain the schools were recognized early in the country's history. Efforts to reform school finance have been a constant throughout the 20th and 21st centuries. For example, in 1891 the Kentucky Constitution provided that funds were to be distributed to school districts based upon the number of school age children, regardless of whether they attended school.[25] In 1941, the constitution was amended to require that a specified percentage of the funding be provided on grounds other than population.[26] Subsequently, in 1953 the constitution was amended to allow the legislature to adopt legislation for a method to establish funding for schools which led to the state's 1954 Foundation program being adopted by the legislature to provide equal educational opportunities throughout the state.[27] Kentucky began a new process of reform after one of the leading school finance cases was decided in 1989.[28] Many states followed similar patterns.

As the court noted in *Rodriguez* with respect to Texas, when the system of finance was created for many states they were predominately rural states, with population and wealth spread relatively evenly throughout the state.[29] The principles of representation and governmental function at the lowest level were dominant at the time that the earliest public schools were established. In this early development of public schools, farm children attended small schools that were voluntarily supported by rural localities. "As long as the population and wealth of the state remained relatively evenly distributed,

24. *Id.* at 489-90.

25. THE KENTUCKY EDUCATION REFORM ACT: A CITIZEN'S HANDBOOK 5 (1994), *available at* http://www.wku.edu/library/kera/handbook/handbook.htm (last visited June 8, 2003).

26. *Id.*

27. *Id.* at 3.

28. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 214 (Ky. 1989). As a result of the *Rose* decision's declaration that Kentucky's system of education finance was unconstitutional, the Kentucky Education Reform Act of 1990 was adopted. For an excellent discussion of the educational reform in Kentucky, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999).

29. *Rodriguez*, 411 U.S. at 7-8 (citing 1 REPORT OF GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE 35 (1969); TEXAS STATE BOARD OF EDUCATION, A REPORT OF THE ADEQUACY OF TEXAS SCHOOLS 5-7 (1938); JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 48-49 (1970); E. CUBBERLEY, SCHOOL FUNDS AND THEIR APPORTIONMENT 21-27 (1905)).

the system of local control and funding was effective."[30] The industrial revolution, shifts in population, and the location of businesses and other taxable property led to disparities in taxable property, resulting local revenue, and levels of expenditure available for education. Small rural schools began to suffer from lack of resources. In many cases, a system that was originally based upon a rural economy developed into one that was unfair to rural communities.

The early schools were within walking distance of students' homes. Walking distance could be anywhere from one-half mile to two miles one way. The rural school was the nucleus for the neighborhood and the school was also the center for the community social activities.[31] The shifts in population have resulted in the development of many questions around the issue of the feasibility of maintaining small rural schools and the method for determining an appropriate level of school finance. Rural schools become an endangered species when the view is that bigger is better. A plea for more resources has often been met with a responsive call for consolidation, combining rural schools or rural school districts. While some view the closing and consolidation of rural schools as a means to provide better educational opportunity for students, imposed consolidation is a conflict-ridden issue in rural communities since they generally have a history of community cooperation and inclusiveness and a desire for sustainable small schools.[32] Rural communities have found support in recent studies that demonstrate the benefits of small schools.[33]

Although nearly 40 percent of United States' public schools were in rural and small towns in the 1998-99 school year and 26 percent of public school students attended small, rural schools, rural schools attracted only 23 percent of federal education dollars and 26 percent of

30. Johnson, *supra* note 6, at 328.

31. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954); THE SCHOOLS OF SAC COUNTY, *at* http://www.rootsweb.com/~iaohms/schools/sac_schools1884.html (last visited June 1, 2003) (citing WILLIAM H. HART, HISTORY OF SAC COUNTY, IOWA 128 (B.F. Bowen & Co. eds. 1914)).

32. *See generally* Robert L. Hampel, *Historical Perspective on Small Schools*, 83 PHI DELTA KAPPAN 357, 360-61 (2002); NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, RURAL EDUCATION: WHAT'S DOWN THE ROAD FOR SCHOOLS 7-8 (1996).

33. *See, e.g.*, BARBARA KENT LAWRENCE, DOLLARS AND SENSE: THE COST EFFECTIVENESS OF SMALL SCHOOLS, *at* http://ruraledu.org/docs/dollars.pdf (2002); Kieran Killeen & John Sipple, *School Consolidation and Transportation Policy: An Empirical and Institutional Analysis*, *at* http://ruraledu.org/docs/killeen_sipple.pdf (2000) (working paper for the Rural School and Community Trust); Patricia E. Funk & Jon Bailey, *Small Schools, Big Results: Nebraska High School Completion and Postsecondary Enrollment Rates by Size of School District, Nebraska Alliance for Rural Education* (1999); *see also* Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 NEB. L. REV. 9 (2003).

the nation's total expenditures for public education.[34] The fact that the percentage of resources approximates the percentage of children attending rural schools, as well as the fact that some rural school districts receive the same per-pupil expenditure as other school districts may lead some to conclude that there is no lack of equity in rural schools. However, these figures alone do not accurately depict the severity of the problem in rural schools. Another complicating factor regarding rural schools is the definition of "rural." The lack of a precise and universally accepted definition has hindered the research on rural schools and communities.[35]

There are unique conditions existing in rural communities which significantly affect education. Some of the significant factors which affect the lack of educational opportunity in rural schools and should be analyzed with respect to each state's finance system include: (1) the percentage of the state's population that is rural; (2) the percentage of rural children in poverty; (3) the percentage of children who are minorities; (4) the average rural teacher's salary; and (5) the rural per capita income.[36] Although there can be no one single solution for rural schools because of the variants in these and other factors, there are many similarities with the problems of rural school finance.

"Ruralism" is a term used by Professor Debra Lyn Bassett to describe a type of discrimination that may not be formally recognized but nonetheless results in a denial of equal education opportunity to rural children.[37] She poignantly describes the culture that has devel-

34. *See* SAVE THE CHILDREN-USA, AMERICA'S FORGOTTEN CHILDREN: CHILD POVERTY IN RURAL AMERICA 28, *at* http://www.savethechildren.org/afc/afc_pdf_02.shtml (2002).
In 1998 and 1999 small and rural schools received a total of about 26 percent of the total education revenue. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPT. OF EDUC, PUBLIC ELEMENTARY & SECONDARY STUDENTS, SCHOOLS, PUPIL/TEACHER RATIOS, AND FINANCES BY TYPE OF LOCALE: 1998 AND 1999, *available at* http://nces.ed.gov/surveys/ruraled/data/Student_Teacher.asp?home=comsupport (Sept. 2001). This figure includes small schools, rural schools located within a central city of a metropolitan statistical area (MSA), as well as rural schools located outside of an MSA. *Id.* This data is derived from the United States Department of Education, National Center for Education Statistics, Common Core of Data survey, and United States Department of Commerce, Bureau of the Census, Survey of Local Government Finances, and other unpublished data. *Id.* These percentages do not reflect the most recent definition of small, rural schools, i.e. only open country and communities with fewer than 2,500 people. *See* ELIZABETH BEESON & MARTY STRANGE, RURAL SCHOOL AND COMMUNITY TRUST, WHY RURAL MATTERS: THE NEED FOR EVERY STATE TO TAKE ACTION ON RURAL EDUCATION 2, *at* http://www.ruraledu.org/streport/pdf/WRM_2003.pdf (Feb. 2003).
35. *See* BEESON & STRANGE, *supra* note 34, at 2; Michael L. Arnold, *Rural Schools: Diverse Needs Call for Flexible Policies,* Mid-Continent Research for Education and Learning Policy Brief, at 1-2 (May 2000) (on file with the Nebraska College of Law Library).
36. BEESON & STRANGE, *supra* note 34, at 3.
37. Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003).

oped in our country that favors urban and suburban success and lifestyles to the disadvantage of rural people. She discusses how this bias manifests itself in the funding of rural education. One way that this occurs is the use of average daily enrollment in school financing formulas coupled with the fact that rural communities have a lower tax base.[38] She notes that this is complicated further by the existence and "invisibility" of rural poverty that is rarely addressed by state and local governments.[39]

Rural districts can often demonstrate that there is a problem of equity and disadvantage affecting the education of rural children by providing evidence that the districts have limited funding, poor facilities, relatively low teacher salaries, few special program staff, and few central office staff. For example, Pennsylvania Partnerships for Children (PPC) recently released a report demonstrating that there is a need to address educational opportunities in rural Pennsylvania. The report shows that: more rural children (18 percent) than urban children (15.5 percent) live in poverty; a single parent heads 24 percent of all rural families; one in 12 rural children is born to a mother under 20; and one rural child in six is born to a mother who has less than a high school education. These factors are further exacerbated by circumstances where although fewer rural high school students drop out of school than the state average, only 18 percent of these dropouts plan to get a GED; one rural infant in five is born to a mother who used tobacco during pregnancy and there is only one primary care doctor for every 358 rural children; compared to one per 184 children statewide; and one pediatrician for every 3,636 rural children, compared to one per 1,303 children statewide.[40]

Organizations in several states have conducted similar studies that highlight the particular challenges facing rural school districts. Some have developed novel solutions to address some of their problems. For example, Alaska initiated a program that helps Alaska natives and others already living in rural districts obtain teaching certificates. The educators work with the local school district, community, and university while earning their credentials.[41] In a recent

38. *Id.* at 307 (citing SARAH DEWEES, IMPROVING RURAL SCHOOL FACILITIES FOR TEACHING AND LEARNING, ERIC CLEARINGHOUSE ON RURAL EDUC. AND SMALL SCHS., *at* http://www.ael.org/eric/digests/edorc998.htm (1999) (noting that funding is frequently tied to enrollment, and that rural districts usually serve fewer children and tend to have lower property value assessments) (on file with the University of Iowa Law Review)).

39. *Id.* at 303 (citing CYNTHIA M. DUNCAN, WORLDS APART: WHY POVERTY PERSISTS IN RURAL AMERICA 201 (1999)).

40. PENNSYLVANIA PARTNERSHIPS FOR CHILDREN (PPC), MILES TO GO: THE WELL-BEING OF PENNSYLVANIA'S RURAL CHILDREN, *at* http://www.papartnerships.org/Rural%20report.pdf (last visited June 3, 2003) (on file with the author).

41. *Scrambling for Staff: The Teacher Shortage in Rural Schools*, EDUCATION WORLD (2000), *available at* http://www.education-world.com/a_admin/admin142.shtml.

national report, Save the Children-USA reports that "the education provided poor rural children is often inadequate and substandard - in part because there are too few rural teachers, and less money is spent in rural schools than urban ones."[42] The failure to attract qualified teachers can have severe consequences. This failure can be manifested in racist attitudes of unqualified teachers that cause children to be overlooked in school which leads to their withdrawal or worse, cause children to be diagnosed as having a behavior problem which requires medication.[43]

Further, as Professor Arthur Levine compellingly describes new problems are being created by applying the new high stake standards testing[44] to rural schools without first improving school finance systems:

> The problem is that standards and testing do not improve failing public schools . . . located predominantly in inner cities and rural areas. When the school-improvement movement began 20 years ago, America's suburban schools were strong, and our . . . rural schools were poor. Today our suburban schools are even stronger, and our urban and rural school systems, attended primarily by low-income and minority children, remain poor.
>
> . . . .
>
> Standards and tests make sense only after this infrastructure is in place. The standards then become the template against which the cure must be measured, and the tests become the vehicle for evaluating whether the standards have been met.
>
> . . . .
>
> We will never improve our . . . schools until we invest in highly qualified and well-prepared teachers and administrators, programs that research confirms really work, up-to-date curriculum materials and modern plants and facilities. We do that for children in the suburbs. Do urban and rural children deserve any less?[45]

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42. SAVE THE CHILDREN-USA, AMERICA'S FORGOTTEN CHILDREN: CHILD POVERTY IN RURAL AMERICA 12, *at* http://www.savethechildren.org/afc/afc_pdf_02.shtml (2002).
43. Roberta Dunn, a youth leader in rural Arkansas gives this account:
    > There is no cultural sensitivity whatsoever in the schools here. Racism is rampant. A large majority of our teachers are white in a mostly black school, and many of them are not familiar at all with the black culture. At our tutoring program, the kids do the work and do it well. And they go back to school and get D's and F's, and after many conversations with teachers, we still can't figure this out. And then there's the medication. You wouldn't believe how many black children in our schools are put on medication. They say that the kids need it, but I know it's because they just can't control them.

    SAVE THE CHILDREN-USA, AMERICA'S FORGOTTEN CHILDREN: CHILD POVERTY IN RURAL AMERICA 28, *at* http://www.savethechildren.org/afc/afc_pdf_02.shtml (2002).
44. *See infra* text accompanying notes 100-103.
45. Arthur Levine, *Tests Find USA, Not Students, Lacking*, USA TODAY, January 8, 2003, at 13A. Arthur Levine is the president of Teachers College at New York's Columbia University. In his article, he shows that many of the same arguments regarding failing urban schools also apply to rural schools.

III. *EQUITY VS. ADEQUACY*

Advocates pursuing school finance litigation reform do so to achieve equity and adequacy. They seek to obtain access to both an equitable and an adequate education for all public school children. When the political branches of government, the governor and the legislature, are viewed as failing to provide for this need, advocates seek the aid of the courts through litigation. Focus on the theoretical shift from equity to adequacy has led some educational reform advocates to suggest that school finance litigation is no longer likely to result in success if the plaintiffs rely on equity theories.

Advocates in a number of states have been successful in obtaining an opinion from their state supreme court that there has been a failure to provide for equal education opportunity.[46] The legal theories relied upon by the successful plaintiffs have been used to categorize the cases as either equity or adequacy claims. Plaintiffs in early school finance cases framed their claims in terms of equity – i.e. the denial of equal education opportunity. In 1971 in *Serrano v. Priest(1)*,[47] the plaintiffs prevailed in state court. The court interpreted both the California State and Federal Constitutional Equal Protection guarantees and found the school finance system was not "fiscally neutral" because the resources available to educate children were a function of school-district wealth, not the wealth of the state as a whole. In their 1969 article, Professors Coons, Clune and Sugarman had articulated the theories to support such a holding.[48] Most scholars have separated the goals of equity and adequacy into two distinct theories, analyzed the past three decades of school finance litigation

46. *See* Opinion of Justices, 624 So. 2d 107 (Ala. 1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); DuPree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), *appeal after remand,* 557 P.2d 929 (Cal. 1976), *cert. denied,* Clowes v. Serrano, 432 U.S. 907 (1977), *and opinion supplemented by* Serrano v. Priest, 569 P.2d 1303 (Cal. 1977); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elementary Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989), *opinion amended by* 784 P.2d 412 (Mont. 1990); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood I"), 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

47. 487 P.2d 1241 (Cal. 1971) (strict scrutiny used to hold that California's school finance system violated the Equal Protection Clause of the United States Constitution).

48. Coons, Clune & Sugarman, *supra* note 6. The *Serrano I* court stated that it had relied upon the article as "a comprehensive article on equal protection and school financing." *Serrano I*, 487 P.2d at 1265 n.37.

into the three waves described above in Part I and cite *Serrano 1* as the beginning of the first of these three waves, ignoring the other school finance litigation, which occurred before *Serrano 1* and also relied upon the Fourteenth Amendment. A few scholars recognize the school finance litigation of the 1960s.[49] This disagreement as to which cases should be considered as defining the first wave of litigation is only one of many reasons to question the categorization of school finance cases into three distinct waves.[50]

It is not uncommon that scholars describe litigation or reform measures in terms of "waves," attempting to find a neat categorical way to describe the theories of reform or litigation attributable to a certain period of time.[51] The concept probably originates from oceanic terms

49. Baker and Green, *supra* note 4; Lundberg, *supra* note 21, at 1107 n.32; Ryan, *supra* note 4, at 253 (citing RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 35 (1982) as "describing the goals and motivation of early school finance advocates"); Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547 (1999); Thro, *Judicial Analysis*, *supra* note 14. Some early unsuccessful school finance cases are *McInnis v. Shapiro*, 293 F. Supp. 327, 332 (N.D. Ill. 1968) and *Burruss v. Wilkerson*, 310 F. Supp. 572, 574 (W.D. Va. 1969).

50. If the view is taken that a wave only begins when there is a success, the "first wave" might accurately be considered as commencing with *Serrano v. Priest I*, since it was the first case to overthrow a school finance system using the Fourteenth Amendment. This appears to be the view of Thro when he first used the term "third wave." *See* Thro, *Third Wave*, *supra* note 15 at 222-25. However, he later describes the first wave as beginning in the 1960s. *See* Thro, *Judicial Analysis*, *supra* note 14.

51. *See, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (discussing the environmental movement rise of the third wave); Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465 (1998) (discussing third wave of tobacco litigation); Craig Haney, *Riding the Punishment Wave: On the Origins of our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27 (1998); Douglas N. Jacobson, Note, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021 (1989) (discussing cases of first and second waves of tobacco litigation); Reed R. Kathrein, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice, System Y2k Litigation: The Plaintiff's Perspective*, 9 KAN. J.L. & PUB. POL'Y 565 (2000); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000) (discussing feminist activism and scholarship); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999); John Hayakawa Török, *The Story of "Towards Asian American Jurisprudence" and its Implications for Latinas/os in American Law Schools*, 13 LA RAZA L.J. 271 (2002) (discussing critical race theory); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, Book Review WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY, 1 CHI. J. INT'L L. 421 2000 (discussing waves of human rights litigation); Major Susan S. Gibson, *War and Anti-War: Survival at the Dawn of the*

and is meant to convey the idea that some powerful force or momentum has occurred that causes a change in the law.[52] The problem is that quite often these waves of reform or litigation are often not so clearly definable. Such is the case with school finance litigation. The theories used in school finance cases are overlapping and most seek the same remedy: equal education opportunity. In her 1979 article, during the "second wave" of equity litigation, Professor Johnson stated that the analysis in recent state court decisions "is directed not at the method of distribution of state funds but at the *adequacy* of the funding with the aim of compelling the state to fund all public education at a higher level.[53] Although discussing a shift from equity to adequacy, another scholar speaks in terms of equity when noting that state education adequacy could be viewed from the perspective of "vertical *equity*."[54] Success in school finance litigation is probably more attributable to the economic, political and social conditions existing in a state at the time a court is considering a case rather than a shift in the plaintiffs' reliance on a theory of equity or adequacy.

This part discusses the interrelationship of equity and adequacy claims and suggests that contrary to the view of some, the use of equity claims in school finance cases remains a viable option. First, it is helpful to further clarify the references to equity and adequacy. Equity claims consist of issues of both pupil and taxpayer equity. Pupil equity focuses on providing every student the same basic educational opportunity, wherever they happen to attend school. Existing disparities have often been expressed in terms of per-pupil expenditure. Taxpayer equity focuses on fiscal neutrality with an aim that every community is able to provide basic educational opportunity with a similar tax effort relative to its ability to pay. The focus of adequacy is the provision to every student the support necessary to achieve a specified level of academic performance mandated by state standards. The adequacy theory in litigation has also been referred to as the quality theory because plaintiffs claim that the education of some children is inadequate based upon the failure of their education to meet the state quality standards.[55]

21st Century, 146 MIL. L. REV. 288 (1994) (book review) (discussing waves of economic development and warfare).

52. For a discussion of the relationship of other oceanic terms to the concept of waves, see Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 44 (1998) (discussing groundswells, waves and tsunamis).

53. Johnson, *supra* note 6, at 325 (emphasis added).

54. *See* Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 495-96 (1995).

55. *See, e.g.*, William E. Thro, *Commentary: Judicial Paradigms of Educational Equality*, 174 EDUC. LAW REP. 1, 33 (2003) [hereinafter Thro, *Judicial Paradigms*]; Matthew M. Craft, Note, *Lost and Found: The Unequal Distribution of*

A. Equity Finance Litigation

Equity claims allege that children attending public schools are deprived of the right to an equal education opportunity.[56] Plaintiffs look to the Federal Equal Protection Clause in the Fourteenth Amendment[57] as well as state equal protection clauses[58] as one basis for relief. If everyone is equal before the law and has the right to equal protection and benefit of the law, and equality includes the full and equal enjoyment of all rights and freedoms, when the education opportunity provided is not equal, some children are deprived of equal protection of the laws. Thus, school finance reform is sought under the principle that legislative action and other measures should be taken to achieve equality and protect school children who are disadvantaged by unfair discrimination.

Issues that arise when pursuing equal protection claims include: (1) whether education is a right protected by the Constitution; (2) whether there is a state equal protection clause; (3) if there is a protected right, what level of scrutiny must the court apply to legislative action; (4) whether the plaintiffs are protected; and (5) if a violation is found, what is the appropriate remedy that the court should order.

The history of the establishment of public education as discussed above in Part II complicates whether education is a right protected by the United States Constitution. As the Supreme Court noted in *Brown*, "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."[59] In *Rodriguez*, the Court noted that a number of courts had ruled that a state's existing finance formula was unconstitutional under the Fourteenth Amendment because the finance scheme did not assure "equal opportunity" for school children throughout the state.[60] One of these first wave cases cited was the 1971 *Serrano* decision by the California Supreme Court. There, the California Supreme Court

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Local Option Sales Tax Revenue Among Iowa Schools, 88 IOWA L. REV. 199, 206 (2002).

56. *See* Thro, *Judicial Analysis*, *supra* note 14, at 600-01 (referring to these claims as "equality suits" seeking "the same amount of money spent on their education, or [asserting] that children were entitled to equal education opportunities").

57. U.S. CONST. amend. XIV, §1.

58. The term "state equal protection clause" refers here to the number of different types of equality guarantee provisions contained in state constitutions. Many states, although not required to, use the same or similar analysis that the United States Supreme Court uses with respect to the Federal Equal Protection clause. *See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

59. 347 U.S. 483, 490 (1954).

60. 411 U.S. at 18-9 & n.48 (citing Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972); Robinson v. Cahill, 287 A.2d 187 (N.J. Super. Ct. Law. Div. 1972)).

rejected the state's education finance system and insisted upon statewide funding equality.[61]

Following the United States Supreme Court decision in *Rodriguez* in 1973, challengers began to rely on rights provided in state constitutions. This was a clear departure from earlier litigation strategy, which focused on Fourteenth Amendment claims. Generally speaking, challengers began to rely on the argument that the state equal protection clause guaranteed equal funding to school districts within a state. Under this approach, plaintiffs could prevail if they could show that: (1) education was a fundamental right; (2) that wealth is a suspect class; or, if no fundamental right or suspect class was involved, that (3) the finance scheme is irrational. Like the plaintiffs in the earlier cases, these challengers pursued claims of equity and also alleged that the quality of a child's education should not be dependent upon where a child lived. Challengers also found constitutional support for their claims in state education clauses. State constitutions, unlike Federal Constitutional language, contain an explicit reference to education.[62] So, these new cases relied upon both state equal protection and education clauses.

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61. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

62. ALA. CONST. art XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, para. 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. II, ch. 5; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. XI. § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. II, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

Scholars disagree as to whether Mississippi's clause is an education clause. *See, e.g.*, Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 635 (2002) (stating that "every state constitution directly addresses education, though in varying degrees"); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991) (interpreting the Mississippi clause "as requiring the Mississippi legislature to establish schools, although it does not mandate the type of schools."); Palfrey, *supra* note 4, at 17 n.21 (2002) ("Unlike the federal constitution, every state—except, arguably, Mississippi—has an education clause."); Thro, *Judicial Paradigms*, *supra* note 55, at 30 n.105 (describing the Mississippi state constitution as the only one that does not contain a state education clause).

The New Jersey Supreme Court's decision in *Robinson v. Cahill*[63] was issued just thirteen days after *Rodriguez* and can accurately be viewed as the start of a new wave of litigation that viewed Fourteenth Amendment Equal Protection claims as essentially foreclosed by *Rodriguez*. The court also rejected the plaintiffs' claims that education was a fundamental right and that wealth was a suspect class under the state equal protection clause, but declared the education financing scheme in New Jersey unconstitutional on the ground that it violated the students' rights to an equal education opportunity in contravention of the state constitution's "thorough and efficient education" clause.[64] In 1976, the California Supreme Court went further in *Serrano v. Priest II*[65] and found that, based upon the California State Constitution, education is a fundamental right and "discrimination in educational opportunity on the basis of district wealth involves a suspect classification."[66] This decision was reached after *Serrano v. Priest I*, was remanded. The court abandoned the Fourteenth Amendment claim, but reaffirmed its strict scrutiny test, and held that the California educational system was unconstitutional under the state equal protection clause.[67] This case gave hope to challengers in other states that they might find relief from disparities in education based upon the presence of education and equal protection clauses in their constitutions. In 1978, the Washington Supreme Court joined New Jersey in relying on the state education clause, rather than the state's equal protection clause, to declare the state finance scheme unconstitutional.[68] These cases demonstrated that a claim for equitable treatment could be based upon either a state equal protection clause or education clause.

State legislatures were ordered to design a new system of school finance. This included providing the definition of an education and the necessary funding. When legislatures seek to address judgments such as those in *Robinson v. Cahill* and *Serrano,* they pursue state equalization schemes. This consists of efforts to provide more revenue for spending in low-wealth districts, place legislative caps on wealthy districts, or redistribute recaptured, "excess" revenues to poorer districts. Thus, equity cases focus on both pupil and taxpayer equity for funding of education. There are two types of pupil equity or equal ed-

63. 303 A.2d 273 (N.J. 1973), *cert. denied*, 414 U.S. 976 (1973).

64. *Id.* at 291. The New Jersey State Constitution requires that, "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4, para. 1.

65. 557 P.2d 929 (Cal. 1976).

66. *Serrano II*, 557 P.2d at 951.

67. *Id.* at 951-53.

68. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 86 (Wash. 1978).

ucational opportunity: vertical equity and horizontal equity.[69] Vertical equity focuses on the appropriate level of unequal treatment of equals. The concept recognizes that not all students have the same needs. It is argued that funding formulas should take these different needs into consideration. Horizontal equity focuses on equal education for equals and consists of equity formulations that attempt to equalize revenues among school districts. These formulations require an examination of the distribution of per-pupil resources across districts. Equal educational opportunity is achieved when district property wealth per pupil and its relationship with revenues for education does not control the funding available for district education resources. Rather, a combination of vertical and horizontal factors drives the determination of the appropriate level of funding. With respect to equity challenges that allege benefits provided students in the state are denied to rural school students, the types of factors considered in Part II above, along with local resources available, would be taken into account when assessing whether a state is providing an appropriate level of resources for a rural district.

Taxpayer equity claims focus not only on the reduction in the fiscal disparity between districts but the relative tax effort needed in districts to generate an appropriate level of resources for education.[70] Taxpayer equity requires an examination of state and district demographics and economics. Particularly relevant factors for rural districts include assessed valuation of farm land, inequalities in fiscal capacity, and disparity in local mill levies.

State valuation of property has traditionally been the primary factor used to determine a community's ability to pay for education. *Ad*

69. *See generally* James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 539 n.29 (1999); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 511-17 (1995). Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 402 & n.23 (1995) (citing LAWRENCE O. PICUS & LINDA HERTERT, U.S. DEP'T OF EDUC., A SCHOOL FINANCE DILEMMA FOR TEXAS: ACHIEVING EQUITY IN A TIME OF FISCAL CONSTRAINT 3 (working Paper No. 33, Jan. 1993)).

70. Macia A. Brown Thunberg, *Raising Revenue for an Adequate Education in New Hampshire*, 20 VT. L. REV. 1001, 1031 n.200 (1996) (quoting John L. Myers, Outline of Remarks to Vermont Republican Legislators 4-5 (May 17, 1995) (listing elements needed for an equitable school finance system to include that: "3) The allocation of state aid is sensitive to the tax rates of school districts. . . . 9) Taxpayers are treated equitably. Property is assessed uniformly. Low income taxpayers are relieved of some of the obligation to pay property taxes. The burden of paying for schools is shared equitably among homeowners and businesses. 10) The state has some procedure to define and measure equity and periodically assesses how equitable the school finance system is.") (outline on file with the Nebraska College of Law Library)).

valorem or property taxes[71] assessed at a local level and raised by mill provided the major portion of the education funds.[72] Each school district then levies taxes according to a state specified mill level. The wide difference in local property can result in significant differences in the dollars available to educate children if this geographical determination controls. The essence of equity claims is that standard school finance systems that are dependent upon local property taxes do not provide the appropriate capacity for all school districts to provide the level of support needed for all students to meet specified standards. Standard school finance systems are challenged based upon the heavy reliance on local property taxes that results in poorer districts having to raise local tax rates that were typically equivalent to or somewhat higher than the average, but not sufficient to generate resources needed for an adequate education. Therefore, a funding formula is sought which recognizes differences in the ability to pay in different parts of the state and inequalities between ability to pay and property values. Income and cost of living are used as measures of ability to pay. Taxpayer equity should also take into consideration all major taxes available in the state, including income, sales, and property tax. This consideration balances the tax-burden that is imposed on all taxpayers.[73] Each category of taxes should also be balanced between local and state collection. For example, a school finance formula that permits local school districts to collect sales taxes to generate school revenue might work to the disadvantage of rural school districts if the rural residents are required to pay a higher percentage of their income than residents in richer districts.[74]

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71. *Ad valorem* is Latin for "according to value." BLACK'S LAW DICTIONARY 53 (7th ed., 1999). The greater the value, the higher the assessment will be.

72. *Ad valorem* taxes are based on a percentage of the property's fair market value, known as the assessed value times the millage rate. One mill is equal to one-tenth of a cent. A millage rate is the tax levy rate, i.e. the rate of tax per thousand dollars of taxable value or 0.1%. The *ad valorem* tax is determined by multiplying the taxable value by the millage rate and dividing by 1,000. For example, $100,000 in taxable value with a millage rate of 5 would generate $500 in taxes. The total revenue needed to be obtained from property taxes in a district is divided by the total assessed value in the district to determine the amount that will be generated per $1,000 of assessed value.

73. *See generally* ELIZABETH BURMASTER, WISC. DEPT. OF PUBLIC INSTRUCTION, A REPORT FROM THE COMMUNITY DIALOGUES ON INVESTING IN QUALITY EDUCATION (2002), *available at* http://www.dpi.state.wi.us/dpi/sprntdnt/dialogue.html.

74. *See* Matthew M. Craft, Note, *Lost and Found: The Unequal Distribution of Local Option Sales Tax Revenue Among Iowa Schools*, 88 IOWA L. REV. 199, 201 & n.16 (2002) (discussing local option sales tax and the fact that rural residents may spend more money in other districts where larger retail centers are located) (citing KENNETH E. STONE & GEORGEANNE ARTZ, AN ANALYSIS OF THE TRANSFER OF FUNDS FROM WEAK RETAIL COUNTIES TO STRONG RETAIL COUNTIES IN IOWA VIA LOCAL OPTION SALES TAXES 1, 11 (1999), *available at* http://www.econ.iastate.edu/retail/LOST% 20article.pdf).

The process of equalization then considers both pupil equity and taxpayer equity. It is possible that unless carefully balanced, taxpayer equity could work to the disadvantage of pupil equity. For example, legislation that equalizes the tax burden in all districts but does not address pupil equity could result in fewer resources available than existed before a challenge. Without the appropriate balancing, efforts may improve taxpayer equity without producing equality of schools within districts.[75] The amount of money needed for education will vary for different locations in response to different local needs and conditions. These goals are reflected in the following description of the 1993 funding system adopted in Indiana:

> The primary goals of the new formula were taxpayer equity, funding equity, and increased funding for at-risk students. Taxpayer equity was achieved by equalizing the revenue (reward) that school corporations receive for their property taxes (effort). The formula neutralized differences in wealth (measured by assessed valuation) and guaranteed in the long run that each school corporation received the same revenue per student for the same property tax rate levied. Funding equity was achieved by reducing disparities in spending among school corporations. The formula accomplished this by providing an equalization grant for school corporations that fell below the statewide average revenue per pupil.[76]

A number of factors have led some to conclude that the second wave litigation was not successful. Equity litigation met some resistance from legislatures and taxpayers when plaintiffs were successful and courts ordered that inequitable finance schemes be remedied. Some taxpayers viewed the equity claims as causing courts to order

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75. *See generally* Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 31 (2002); John Augenblick, *Augenblick, Van de Water, & Myers: Equity in Public School Finance*, N. CENT. REG'L EDUC. LABORATORY, *at* http://www.ncrel.org/sdrs/areas/issues/envrnmnt/go/94-waug.htm (posted March 6, 1995) (referring to equity for taxpayers and equity for children and noting that "some states emphasize one more than the other" and adding that "[i]f all that were necessary was to replace the lost property tax revenue with revenue from a tax that is perceived as fairer, the problem for taxpayers might be solved. But that alone will not solve the pupil equity problem, which takes more work."); CLEARINGHOUSE ON EDUC. MGMT., COLL. OF EDUC., UNIV. OF OR., MAJOR DEVELOPMENTS IN SCHOOL FINANCE EQUITY: A SHIFT TO SCHOOL-LEVEL EQUITY, *at* http://eric.uoregon.edu/trends_issues/finance/03.html (last visited June 8, 2003).

76. Rep. B. Patrick Bauer, *A Democratic Response to the Indiana School Funding Formula*, 1 S. BEND POL'Y PERSP. 1 (Nov. 1995), *at* http://www.indiana.edu/~iepc/bauer.html (last modified Mar. 8, 1997). Indiana's finance reform was not the result of a court order. It was precipitated by the 1987 equity lawsuit, *Lake Central v. State of Indiana*, No. 56 Col-8703-CP-81 (Newton County Cir. Ct., Ind., filed 1987), which was withdrawn. *See generally* Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 629 (1998); Marilyn A. Hirth, *A Multistate Analysis of School Finance Issues and Equity Trends in Indiana, Illinois, and Michigan, 1982-1992: The Implications for 21st Century School Finance Policies*, 20 J. EDUC. FIN. 163 (1994).

"Robin Hood" remedies,[77] requiring increased property tax bills[78] and eliminating local control.[79] Additionally, initial victories under the second wave were followed by victories in less than half of the states where claims were litigated.[80]

After the 1989 plaintiff victories in Montana, Texas and Kentucky,[81] some advocates and scholars viewed these successes as a way to avoid some of the problems associated with second wave lawsuits. The cases came to be described as the end of the second wave, 1973-1988, and the start of the third wave of school finance litigation because the decisions were based solely on violations of state constitution education clauses.[82]

B. Adequacy Litigation

In *Rodriguez*, the State claimed that its funding formula provided an "adequate" education,[83] as required by the state foundation program that had been enacted to fulfill the state's obligations under its education clause. The Supreme Court noted that no proof had been offered to refute this claim.[84] In response to this argument, but based upon state constitutional provisions, plaintiffs began to concentrate their claims more on the types of outcomes they were seeking rather than inputs. The relief sought was phrased in terms of the state's duty to provide an adequate education.

Some commentators have attributed failures of "second wave" equity claims to objections based on local control and see the third wave

77. *See generally* Dyson *supra* note 4, at 58; Kramer, *supra* note 75, at 29-31 (discussing the Texas "Robin Hood" model); Morgan, *supra* note 4, at 143; William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL'Y 607, 610 (1996); Sarah S. Erving, Note, *New York's Education Finance Litigation and the Title VI Wave: An Analysis of Campaign for Fiscal Equity v. State*, 10 J.L. & POL'Y 271, 281 (2001).

78. *See generally* Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003).

79. *See* Baker & Green, *supra* note 4, at 681.

80. *See id.* at 680-681 (noting that during the second wave litigation "plaintiffs prevailed in seven states but lost in 14 others.") Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Vermont are the seven successful states.

81. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 214 (Ky. 1989); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 688 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

82. *See, e.g.*, Baker & Green, *supra* note 4, at 681; Kramer, *supra* note 75, at 7; Palfrey, *supra* note 4, at 3 ("Part I argues that the 'adequacy' model of reform addresses many of the underlying concerns of the equity model without sharing its methodological and strategic shortcomings.") (footnote omitted); Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 542 (1991).

83. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

84. *Id.*

adequacy claims as more successful[85] and appealing because they emphasize educational opportunity and do not demand equal education spending.[86] However, with respect to the objection to interference with local taxing and spending discretion, local control over finances can be distinguished from local control over policy. A finance scheme can be constructed that provides funding on a statewide basis but leaves in place local control over spending. Even the local spending discretion may be outdated. One commentator has stated that "[t]he traditional image of 'participation and control of each district's schools at the local level' does not, however, describe the realities of present-day school governance."[87]

If equity claims are viewed as seeking equal educational opportunity rather than equal per pupil expenditures, the second and third waves of litigation merge into one wave, rather than shift from one to the other. There are successful cases in each wave that have relied upon the equal protection clause, or the education clause, or both. Third wave successes have not been based exclusively on education clauses. Some scholars have labeled a litigation strategy that includes a claim based upon the education clause as "equity-plus."[88] This is a more accurate term to describe the successful litigation strategy that has evolved. The cases are a combination of equity arguments, plus a demonstration of the appropriate level of resources to fulfill the state's constitutional obligation.

Observing that courts began to increasingly find in favor of plaintiffs, William Clune described the "shift" as moving to "equity-plus."[89] The goal of equal education opportunity was affected by the move to adopt student-outcome standards. The remedy for an inequitable financing system no longer had to focus solely on per pupil expenditures or taxpayer relief, but could include a claim that additional resources

85. *See* Kramer, *supra* note 75, at 7 & n.35 (noting successes for plaintiffs as "13 wins out of 21 attempts, compared with 7 of 16 earlier") (citing Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 149 (Helen F. Ladd et al., eds., 1999)).

86. *See generally* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 582 (1998) (describing "'deep seated' convictions" regarding local control of education); Palfrey, *supra* note 4, at 20.

87. Michael A. Rebell, *A Colloquium on Public Education Reform: Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 706 (1994-1995).

88. Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 172-180 (2002) (describing the strategy of the lawyers in the Brigham case as "equity plus implied adequacy" and the holding of the Vermont Supreme Court as "adequacy plus equity").

89. WILLIAM H. CLUNE, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994).

were needed to meet the full cost required to achieve high minimum outcomes that were constitutionally required. As Professor Heise describes the phenomenon, "educational standards and school finance litigation converged in a way that enables school districts to gain financially from their inability to meet desired achievement levels. These failures are used in court to bolster legal claims that such schools underachieve because their resources are inadequate and, therefore, unconstitutional."[90] All school districts should reach or exceed an adequate level of education. For example, Maryland's adequacy study states that "schools are being adequately funded when the amount of funding provided is sufficient to allow students, schools and school systems to meet prescribed State performance standards."[91]

The third wave cases present similar problems regarding definitions as existed with the second wave cases. This is illustrated by the fact that some scholars have suggested that equity or inequality is easier to define and prove than adequacy,[92] while others have suggested the opposite.[93]

A school finance reform strategy should include careful consideration of the emphasis to be placed on a state education clause. As one

90. Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 634 (2002).

91. MARYLAND COMMISSION ON EDUCATION, FINANCE, EQUITY AND EXCELLENCE: FINAL REPORT x, *at* http://mlis.state.md.us/other/education/final/2002_final_report.pdf (2001).

92. *See, e.g.*, Baker and Green, *supra* note 4, at 682 ("Because adequacy is such a difficult term to define, some courts have either refused to declare such a standard, or deferred to the state legislatures' definition of an adequate education. Such deference virtually guarantees that the plaintiffs will be unable to succeed in their adequacy claim."); Kramer, *supra* note 75, at 11; James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 549 (1999) ("[I]t is not at all self-evident why certain aspects of an adequate education . . . are included within the courts' definitions, and others . . . are excluded."); Eric Berger, Note, *The Right to Education Under the South African Constitution*, 103 COLUM. L. REV. 614, 641 (2003) (discussing South African school finance and stating that "[i]nadequacy is often subjective, relying on general standards"); Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 655-56 (2001) (seemingly arbitrary determinations of what constitutes adequacy); Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1884 (1998); *see also* Frank Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 556, 576-77 (1996) (concluding adequacy alone may be a problem because the term "adequate" can lead to stagnate or outdated standards).

93. *See, e.g.*, Baker & Green, *supra* note 4, at 681 ("One reason for this lack of success involves the difficulties in defining equality."); Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 495 (1998) (arguing that adequacy approach is less complex than equity).

commentator suggests: "A strong clause aids both adequacy-based and equity-based challenges. It aids an adequacy challenge by raising the rhetorical constitutional bar the state must meet. It aids an equity-based challenge by making it much easier for a court to find that education is a fundamental right within a *Rodriguez* analysis."[94] Equity claims do not preclude adequacy claims while equal protection claims do not preclude adequacy claims. During the third wave some courts have defined the state's obligation by relying only on the education clause,[95] or on both education and equal protection clauses.[96] The lack of clear distinction between the two waves also can be observed by focusing on the language used to describe the litigants' strategy[97] and by focusing on remedies. The goal of equal education opportunity has been artificially forced into two litigation strategies: it becomes an "equity" claim if reliance is placed upon an equal protection clause and an "adequacy" claim if reliance is placed upon an education clause. Lawsuits filed since 1989 have not exclusively relied upon education clauses.[98] In each instance, courts seek to determine (1) if there is a right to an education; (2) what the right consists of; and (3) whether the right has been violated. Some courts answer these questions without relying upon an equal protection clause.

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94. Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 554-555 (1999). For a description of education clauses, see generally *id.* at 553-54; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 (1985) (describing four general categories of state education clauses); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993) (summarizing education clauses in state constitutions).

95. *See, e.g.*, Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Abbott v. Burke, 643 A.2d 575 (N.J. 1994). However, the New Jersey court found both standards in its state's education clause.

96. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995).

97. For example, both equal protection and adequacy language are used with respect to *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997) ("Given these advantages and the success other third wave plaintiffs have had with quality arguments under state education clauses, the plaintiffs' claim in *Leandro* that they have a fundamental right to 'adequate educational opportunities' under the North Carolina Constitution is well chosen.") Margaret Rose Westbrook, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123, 2161 (1995). *See also* Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 543 (1991) ("Many fiscal equity litigants in recent cases have been able to effect reform through the use of education clauses in state constitutions.").

98. One advantage to combining state equal protection claims with references to state education clauses is that such litigation has fewer implications for other areas of law than claims based solely on equal protection clauses. *See* Heise, *State Constitutions, supra* note 3 at 1159.

One remedy ordered by the courts has been the adoption of a state foundation program, which the state can demonstrate was designed to improve student outcomes. The outcomes would then serve as a measure of equality.[99] This outcome focus is another reason some have concluded that there has been a shift in school finance litigation. This shift has been described by some scholars as shifting the focus of school finance reform from inputs to outcomes.[100] The outcomes are often linked to the adoption of high stakes assessment tests. The tests are used as a proxy measure to determine if public schools are successful and children are receiving an adequate education.

They are referred to as high stakes because they are used to hold schools accountable and make crucial decisions about allocation of funds for resources, such as the number of schools, teachers, and administrators.[101] The tests are also used to make crucial decisions about individual students, such as whether they will graduate from high school. Although high stakes assessments have been criticized for their negative affect on certain populations,[102] they might also be used as evidence to support claims for additional inputs (resources) to generate the desired outcomes. Professors Ryan and Heise conclude that high poverty schools generally have lower academic achievement than low poverty schools.[103] Inequalities of inputs that might be

99. *See, e.g.*, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 151 (1995). William Clune has defined adequacy as the achievement of high minimal outcomes for all students, see Clune, *supra* note 20, at 376.

100. Lawrence O. Picus, *Perspectives Adequate Funding Courts Wrestle with a New Approach to Fair and Equitable Funding for Education*, AM. SCH. BOARD J. (2002), *at* http://www.asbj.com/schoolspending/picus.html.

101. Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 646-47 (2002).

102. High stakes assessments have been criticized for their affects on certain populations such as minority children and children in low wealth districts because the assessment plans have been put into place before appropriate levels of funding have been provided to assist with student performance. *See generally* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002); Dyson *supra* note 4; Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice With Diminishing Legal Relief For Students at Risk*, 75 TEMP. L. REV. 863 (2002); Christopher M. Morrison, Note, *High-Stakes Tests and Students with Disabilities*, 41 B.C. L. Rev. 1139 (2000); AUDREY L. AMREIN & DAVID C. BERLINER, ARIZ. STATE UNIV., THE IMPACT OF HIGH STAKES TESTS ON STUDENT ACADEMIC PERFORMANCE: AN ANALYSIS OF NAEP RESULTS IN STATES WITH HIGH-STAKES TESTS AND ACT, SAT, AND AP TEST RESULTS IN STATES WITH HIGH SCHOOL GRADUATION EXAMS, *at* http://www.greatlakescenter.org/research.htm (last visited June 8, 2003).

103. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103 (2002) (quoting MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 73 (1997) ("The poverty level of the school (over and above the economic status of an individual student) is negatively related to standardized achievement scores.")).

targeted as affecting outcomes include class size, teachers' credentials, and facilities. Early in the "third wave" of litigation, Professor Clune analyzed state supreme court decisions, particularly from Kentucky, New Jersey, and Texas, and developed a three part remedy which recognizes the link between equity and adequacy claims. His remedy provides for a focus on both inputs and outcomes:

> (1) a base program of substantial equality of spending . . . ; (2) compensatory aid calculated to produce substantial educational gains for children affected by poverty . . . ; and (3) a set of performance-oriented policies designed to improve the impact of educational resources on student achievement.[104]

The interrelationship of equity and adequacy can be demonstrated by a hypothetical. Suppose a state remedy that is ordered is outcome focused. If the state has two districts that have great disparities in per pupil spending but are substantially equal on their state testing assessments, the argument might be made that the state has fulfilled its duty to provide an adequate education. Imagine, however, that in both districts upon entering the elementary school the bright sunlight shines in from above. In the school with a high per pupil expenditure the light comes in from a beautifully designed skylight, while in the school with low property wealth and low per pupil expenditure, the light shines in from the numerous cracks in the ceiling of the deteriorating school building. Are the students receiving an equal education opportunity?

School finance strategy will continue to embody both concepts: equity - educational resources and the tax burden to support them are distributed fairly; and adequacy - resources provided at the level needed to meet goals and standards.[105] As Professors Patricia First and Barbara De Luca conclude, reliance upon education clauses "should not imply . . . that educational policy has retreated from the equity struggles or that the focus on adequacy is an improvement over equity either in concept or goals."[106]

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104. William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 722 (1992). In a later article, Professor Clune recognizes the interrelationship of equity and adequacy when he describes later cases as "modern adequacy cases" and being "between the old equity theory and the 'true adequacy' approach." William H. Clune, *Accelerated Education as a Remedy for High-Poverty Schools*, 28 U. MICH. J.L. REFORM 655, 658 & n.14 (1995) (citing William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994) (describing the evolution of litigation strategies used to reform inadequate school finance structures)).

105. *See* William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 EDUC. L. REP. 11, 24 (1993) (noting that the McWherter decisions demonstrated the viability of an equity-based claim).

106. Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of Derolph*, 32 J.L. & EDUC. 185, 189 (2003).

IV. USING EQUITY BASED THEORIES TO REMEDY RURAL SCHOOL FINANCE

In this part, "equity claim" is used in the more restrictive sense. That is, an equity claim alleges that the state's method of financing the public schools prevented some children from receiving an equal education opportunity and that such denial violates the equal protection clause of the state constitution. Such a claim for equal education opportunity can be based either upon (1) a focus on educational equity, i.e. the denial of substantially equal per pupil expenditures or (2) tax-rate equity, i.e. the imposition of a substantially unequal taxpayer burden in order to finance local schools resulting from inequities in tax bases or tax rates. As discussed above, equity claims are successful if the plaintiffs convince the court of one of three basic points: (1) education is a fundamental right; (2) wealth is a suspect class; or (3) the state finance system is irrational.[107] The claim in most cases will be coupled with an allegation that the state has violated the education clause. The two cases discussed here demonstrate how an equal protection claim can be used successfully.

A. Tale of Two Cases: How Equity Claims were Successful in Vermont and Wyoming.

1. Per-Pupil Equality: Brigham v. State[108]

> "A higher percentage of Vermonters and their public school students live in rural communities than any other state, and it is near the top in the percentage of schools in rural communities (4th) and students in small rural schools (3rd)."[109]

Vermont is a small rural state.[110] According to a 2000 Department of Education report, Vermont ranks first in the percentage of students attending rural schools (58%), and second in the percentage of schools located in rural places (68.6%).[111] Therefore, Vermont school finance litigation may have particular meaning for other rural communities. The Supreme Court of Vermont has held that its state finance system was unconstitutional in that it deprived many children of an equal

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107. *See* Thro, *Judicial Paradigms*, *supra* note 55, at 31 n.108.
108. 692 A.2d 384 (Vt. 1997).
109. *See* BEESON & STRANGE, *supra* note 34, at 69.
110. Vermont ranks 43rd in geographic area (9,615 square miles) and 49th in population with 608,000 people. VERMONT ALMANAC, *available at* http://www.netstate.com/states/alma/vt_alma.htm (last visited May 24, 2003). Vermont is considered the most rural state because a larger percentage of its residents live in communities of less than 2,500 than any other state. *See* BEESON & STRANGE, *supra* note 34, at 69.
111. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, STATE PROFILES OF PUBLIC ELEMENTARY AND SECONDARY EDUCATION: 1996-97 (2002), *available at* http://nces.ed.gov/pubs2000 2000304.pdf.

educational opportunity.[112] As a result, Vermont is in the process of trying to implement legislation that will provide equality in education.[113]

In 1995, when an "equity" lawsuit was brought in Vermont, public schools were financed like most public schools, through local property taxes assessed in accordance with a state statute[114] and funds were distributed by the state based upon its education finance formula, known as the Vermont Foundation Plan.[115] The intent of the system was to provide a per pupil expenditure in each school district to "provide at least a minimum-quality education."[116] School districts with greater property wealth received more property tax revenue, could spend more per pupil, and arguably provided a better education to its students. The lawsuit claimed that wealthy districts had an unfair advantage over poorer districts in educating students. The lawsuit, which was filed against the State of Vermont on behalf of student plaintiffs Amanda Brigham and Spencer Howard, eight taxpayers, and the Brandon and Worcester Vermont school districts, claimed that the state's education finance system violated the equal protection and education clauses of the Vermont Constitution and sought declaratory relief.[117] More specifically, the students claimed that they were deprived of their right under the state and federal constitutions to the same equal educational opportunity as students residing in wealthier school districts. The property owners claimed that they were required to contribute more than their just share of funding for education. The two school districts claimed that the state educational finance system deprived them of the ability to raise sufficient money to provide the equal education opportunities to their students as those provided to students in wealthier districts and further required them to impose disproportionate tax rates in violation of the federal and state constitutions. The lawyers knew that they were facing an uphill battle since

112. Brigham v. State, 692 A.2d 384 (Vt. 1997).

113. *See generally* Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 182-88 (2002); Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644 (2001) (discussing seemingly arbitrary determinations of what constitutes adequacy).

114. VT. STAT. ANN. tit. 16, § 511 (Supp. 2000).

115. VT. STAT. ANN. tit. 16, §§ 3441-49 (repealed 1997). *See* Brigham v. State, 692 A.2d 384, 386-88 (Vt. 1997).

116. *Brigham*, 692 A.2d at 388.

117. *See* Robert Gensberg, *The Road to Equal Educational Opportunity for Vermont School Children*, 22 VT. L. REV. 1, 2 (1997) (ACLU lawyer); *see also* Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation In Vermont*, 31 J.L. & EDUC. 167, 174-175 (2002) (noting that plaintiffs did not want to rely on adequacy issues because of the difficulty in defining adequacy and the fact that they wanted to avoid a long complicated trial).

at the time that the lawsuit was filed, sixteen states had declared their funding systems to be unconstitutional, but at least twenty others had rejected such claims.[118]

In July 1996, the state filed a motion for summary judgment seeking dismissal of the lawsuit. In October, trial court Judge John Meaker of Lamoille Superior Court granted the state's motion for summary judgment on two of the three constitutional issues raised by the plaintiffs.[119] He held that the claims based upon the Federal Constitution were barred by the Supreme Court's *Rodriguez* decision, and that the education clause of the Vermont Constitution did not establish a fundamental right to an education.[120] That clause provides in relevant part:

> Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.[121]

This rejection led him to further conclude that the common benefits clause of the Vermont Constitution did not require strict scrutiny of the state education funding system and therefore the state was not required to show that the system advanced a compelling governmental interest and was narrowly tailored to serve that interest. The common benefits clause has been described as the counterpart of, or similar to, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and provides in pertinent part:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. . . .[122]

The trial court denied summary judgment as to the claim that the financing system violated the common benefits clause because it was not rationally related to a legitimate governmental purpose. In addition, the trial court let the claim proceed that taxpayers were required to make disproportionate sums to fund education in violation of their rights under the taxpayer equity clause of the state constitution[123] which provides:

> That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expense of that protection. . . .[124]

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118. Gensburg, *supra* note 117, at 2-3, n.7 & 8 (citing court opinions) (citations omitted)).
119. Gensburg, *supra* note 117, at 12.
120. *See Brigham*, 692 A.2d at 386-87.
121. VT. CONST. ch. II, § 68.
122. *Id.* ch. I, art. 7.
123. *See Brigham*, 692 A.2d at 387.
124. VT. CONST. ch. I, art. 9.

The parties appealed the judgment to the Vermont Supreme Court, except for that portion dismissing the Federal Equal Protection claims. In 1997, the Vermont Supreme Court, in *Brigham v. State*,[125] agreed with the plaintiffs, reversed the trial court and without remanding for trial, declared the state's finance system unconstitutional because of inequities caused in large part by locally approved tax levies. The court described the state finance system and noted that some districts spent twice as much per pupil as other districts,[126] some districts spent less per student while paying higher tax rates, and 60% of the total cost of public education came from local property taxes. It characterized the state's foundation formula as failing to eliminate wealth disparities and equalizing "capacity only to a level of minimally adequate education."[127] The *Brigham* court further stated that it was "simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities . . . ."[128] The court held that regardless of the level of scrutiny applied to the school finance system, the State failed to provide "a persuasive rationale for the undisputed inequities in the . . . funding system"[129] and the system was constitutionally deficient. In reaching its conclusion with respect to per pupil or educational equity, the court examined Vermont's Constitution to determine (1) if there was a right to education and (2) whether there was a right to equal education opportunities. The court declined to rule on the issue of taxpayer equity because it was not adequately briefed or argued by the State as to its opposition to the trial court's denial of summary judgment on this issue.

a. The Right to Education: Examining the Education Clause

The court traced the origin of the Vermont education clause in the 1777 constitution[130] as being derived from the 1776 Pennsylvania Constitution. The clause was subsequently amended in 1786 to be combined with the state's "virtue" clause.[131] The education clause

125. 692 A.2d 384, 397-98 (Vt. 1997). That same year, the Ohio Supreme Court held that its state had failed to provide an education funding system as required by the state constitution. *DeRolph v. Ohio*, 677 N.E.2d 733, *clarified by* 678 N.E.2d 886 (Ohio 1997) (per curiam).

126. "In December 1994, the top 5 percent of school districts spent from $5,812 to $7,803 per student, while the bottom 5 percent spent from $2,720 to $3,608." *Brigham*, 692 A.2d at 389.

127. *Id.* at 396.

128. *Id.*

129. *Id.* at 390.

130. "A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth. . . ." VT. CONST. of 1777, ch. II, § 40.

131. "Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force. . . ." *Id.* ch. II, § 41.

then became very similar to the present education clause.[132] As one of the plaintiffs' lawyers explained it, a historical examination reveals that in the virtue clause, the framers of the constitution were referring to the "virtue of the Enlightenment—in the sense of Locke or in the sense of Benjamin Franklin."[133] As he explained further, "it meant . . . good citizenship;"[134] and the combination of the two clauses meant that the framers believed that good citizenship was directly linked to education.

These arguments were convincing to the court. The court found that the framers' intent was to identify "fundamental human rights," such as education along with a governmental framework. At a time when there were few state-supported public schools, a duty was imposed upon the state to maintain a public school system. The court emphasized the importance of education to the responsibilities of citizenship and concluded that education is mandated by the constitution but the system of reliance on local property taxes is not.[135] The court provided an extensive discussion of the importance of education to prepare students for political participation in democratic self-government and noted that early decisions of the court emphasized the importance of education and the state's responsibility.

The Vermont Supreme Court emphasized the importance of the move from a rural society to a more developed one in its consideration of the state's long history of reliance on local control and local taxes to finance school systems:

> Means and methods that were effective in a rural society with limited development of property resources and largely local industries may become ineffective with the advent of major ski resorts and sizable industrial developments. The towns where the employees of these businesses actually live and educate their children bear the financial burden of development, while reaping none of the tax advantages.[136]

The court further emphasized that its review of the constitutional history revealed that, "education was the *only* governmental service considered worthy of constitutional status."[137] The court, after having established that the right to an education is present in the Vermont Constitution and that such right was not being met by the existing school finance system, then turned to the question of whether this failure was a violation of the State's common benefits clause.

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132. "Laws for the encouragement of virtue, and prevention of vice and immorality, ought to be constantly kept in force, and duly executed: and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth. . . ." VT. CONST. of 1786, ch. II, § 38.

133. Gensburg, *supra* note 117, at 5.

134. *Id.*

135. *Brigham*, 692 A.2d at 392.

136. *Id.* at 395.

137. *Id.* at 391.

b. Equal Education Opportunities: Applying Equal Protection Principles

The court first referenced its previous holdings that the common benefits clause was coextensive with the Equal Protection Clause of the United States Constitution and therefore as a general rule applied a rational basis test to challenged statutory schemes[138] with the more searching inquiry of the strict scrutiny test applying only when either a suspect classification or a fundamental right is affected. Then, with respect to the educational finance system, the court concluded that regardless of the level of scrutiny applied, the court was "simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities"[139] that existed in Vermont. In the court's view, the outcome would be the same under both a rational basis and a strict scrutiny standard of review. The financing system was determined to be capricious.

The state's argument that the system was appropriate because it was necessary to maintain local control over school districts was rejected by the court. The court found that local control over decisions could still be maintained without reliance upon the existing financing scheme. With respect to the State's argument that even if a constitutional right to an education existed there was no requirement that it had to be equal, the court agreed and held that "absolute" equality of funding was not required.[140] The court emphasized that in many situations differences in funding may be required to achieve reasonable educational equality of opportunity.[141]

To support its conclusion that a "minimally adequate education" did not meet the requirements of the common benefits clause, the court looked to the words of Justice Marshall in his *Rodriguez* dissent: "The Equal Protection Clause is not addressed to . . . minimal sufficiency but rather to the unjustifiable inequalities of state action."[142] The plaintiffs' lawyers had based their case upon Justice Marshall's dissent.[143] The court admonished the state that "[e]qual educational opportunity cannot be achieved when property-rich school districts may tax low and property-poor districts must tax high to achieve even minimum standards."[144] In holding that the constitution required the State to ensure "substantial equality" of educational opportunity, the court emphasized that cities and towns were not prohibited from spending more on education, that differences in per-pupil expendi-

138. *Id.* at 395-96.
139. *Id.* at 396.
140. *Id.* at 397.
141. *Id.*
142. *Id.* at 397 (quoting *Rodriguez*, 411 U.S. at 89 (Marshall, J., dissenting)).
143. Gensburg, *supra* note 117, at 15.
144. *Brigham*, 692 A.2d at 397.

tures were permissible, and that it was the function of the legislature and the court to determine the appropriate means to fulfill the constitutional obligation.[145] The case was remanded to the trial court to maintain jurisdiction, until the legislature enacted valid legislation that determined the specific means of achieving substantial equality. The legislature was then faced with the task of enacting legislation that addressed issues such as the level of state funding for public schools, the sources of additional revenue, and the framework for distributing state funds.[146] The court referred to a number of variables that could cause the difference such as district size, transportation costs, and special education needs. The *Brigham* decision is consistent with the analysis used by other courts in their determination of the appropriate measure for determining compliance with the equal protection requirement. Courts have generally concluded that equality means substantial equality between both the tangible and intangible factors of an education and compare a number of factors including public funds, buildings, sites, accreditation, curriculum, faculty and instruction, equipment and instructional materials, libraries, physical and mental health and nursing services, extra-curricular activities, and transportation.[147]

2. *Taxpayer Equity: Wyoming* - Campbell County School District v. Wyoming

a. *The Wyoming Foundation Plan*

> "Wyoming's 172,438 rural people . . . constitute more than one-third of the state's population . . . ."[148]

Equality in funding has been pursued in Wyoming since the early seventies. The state is in the process of implementing a newly enacted centralized school finance system. The disparities that existed in per pupil expenditures are being addressed by measures that also address taxpayer equity. Under the Wyoming Foundation Program, the reve-

145. The Vermont Supreme Court cited the opinions of the Kentucky, Tennessee, and Texas courts. "See Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989) (state constitution requires that educational opportunities be 'substantially uniform throughout the state'); McWherter, 851 S.W.2d at 156 (state education financing system must provide 'substantially equal educational opportunities'); Edgewood, 777 S.W.2d at 397 (state constitution requires 'substantially equal access to similar revenues per pupil')." *Brigham*, 692 A.2d at 397-98.

146. A statewide property tax was enacted in 1997 to replace the local property tax. The intent of the legislation was to equalize funding across school districts. This meant that poorer districts would pay lower taxes and receive more state funds. *See* Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 176-180 (2002).

147. *See, e.g.*, Gebhart v. Belton, 91 A.2d 137, 145-52 (Del. 1952), *cert. granted*, 344 U.S. 891 (1952), *aff'd*, Brown v. Board of Educ., 349 U.S. 294 (1955).

148. Beeson & Strange, *supra* note 34, at 74.

nue available to a local school district is based primarily upon statewide generated revenue rather than a local property tax. The actual distribution of the dollars is left up to the local school district. In the 1995-96 school year, Wyoming received 44.5% of its education revenue from local funds, 49% from state and about 6.5% from federal.[149] The percentages in the 2001-2003 school year were 41.3% local and 50.1% state.[150] Although the equalization effort has not resulted in dramatic changes in percentages and is less than the national average,[151] the newly adopted foundation plan attempts to incorporate taxpayer equity as well as pupil equity and educational adequacy by centralizing school funding. The state legislature has attempted to construct a model that balances taxpayer equity, pupil equity and educational adequacy. The fiscal equity considers not just what students receive, but how heavily the tax burden rests on residents of different communities.

Locally imposed optional mill levies were eliminated and districts may no longer retain more from their local property tax base than 100 percent of a state guaranteed per pupil revenue amount. Yet, no statewide levy has been enacted and Wyoming does not have an income tax.[152] It also has only a nominal state property tax of 4 percent.[153] The lack of income taxes and the unique severance tax[154] source results in Wyoming not relying upon the common model for state revenue where revenue flows from roughly equal use of income,

149. NATIONAL EDUCATION ASSOCIATION, RANKINGS OF THE STATES: 1996 (1997) (reported in Penny L. Howell & Barbara B. Miller, *Sources of Funding for Schools*, 7 THE FUTURE OF THE CHILD J., No. 3 (1997), *available at* http:www.futureofchildren.org/usr_doc/vol7no3ART3.pdf).

150. NATIONAL EDUCATION ASSOCIATION, RANKINGS & ESTIMATES: RANKINGS OF THE STATES 2002 AND ESTIMATES OF SCHOOL STATISTICS 2003, *at* http://www.nea.org/edstats/images/03rankings.pdf (2003).

151. In 1998-99, the state share of revenue rose to 48.7 percent while the local share decreased. The federal share was 7.1 percent. NATIONAL CENTER FOR EDUCATION STATISTICS, 2001 Table 157, *at* http://nces.ed.gov//pubs2002/digest2001/tables/dt157.asp (last visited June 8, 2003).

152. Nine states (Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming) have no broad-based personal income taxes. *See* UNITED STATES TAXES.COM, *at* http://www.stateincometax.unitedstatestaxes.com/index.htm (last visited June 8, 2003).

153. WYO. DEPT. OF REV. EXCISE TAX DIV., GUIDE TO SALES AND USE TAX 1 (2001), *available at* http://revenue.state.wy.us/contentroot/FAQ/Property%20Tax%20System.pdf.

154. STATE OF WYOMING PROPERTY TAX SYSTEM, *at* http://revenue.state.wy.us/contentroot/FAQ/proptax/Property%20Tax%20System.pdf. Severance tax is levied by the state for "severing" a mineral from the earth. These taxes are paid to the state and are distributed to the general fund, the permanent mineral trust fund, schools, cities, towns, highways, counties, and the water-development funds. In 2002, oil and gas contributed $267.1 million in Wyoming severance taxes. THE PETROLEUM ASSOCIATION OF WYOMING, *The Importance of Petroleum*, 3 SUBLETTE EXAMINER, no. 4 (Apr. 24, 2003).

sales, and property taxes. Instead, payments are made to school districts from a foundation program account. Revenue sources for the account include the twelve mill statewide property tax authorized by the Wyoming Constitution and dedicated for school purposes,[155] rents and other income from common school land,[156] federal mineral royalties and mineral severance taxes, state and local sales taxes, and funds recaptured from school districts.

The Foundation Program provides a guaranteed level of funding to every Wyoming public school district.[157] The guarantee is essentially a block grant and is based on a number of factors, including the number of students enrolled in each district in the prior year.[158] An Education Resource Block Grant is allocated based on an analysis of the cost of an adequate education. It is commonly referred to as a Cost Based Block Grant Model because it is based upon the resources necessary to deliver the "proper education" or "basket of goods and services" to each student based upon actual cost. It is "cost-based" because the amount a particular district receives depends on the specific characteristics of that district that raise or lower the actual costs that that district faces. It is a "block grant" because most of the funding for operating local schools is received by school districts in the form of a lump sum of money that school districts determine how to spend.[159]

Local revenue sources are considered in the determination of the amount of the grant that a school district will receive from the state. These revenue sources include federal mineral royalties, tuition reimbursements, Taylor Grazing Act[160] funds, fines and forfeitures, and motor vehicle registration fee allocations.[161] The foundation program

155. School Foundation funding and the mandatory county levies are fixed by law at twelve and six mills respectively. All school districts are required to impose a 25 mill levy counted as a local resource toward meeting a district's operational funding level guaranteed by the state. WY. STAT. ANN. §§ 21-13-102, 21-13-303 (2003).

156. WYOMING EDUCATIONAL REFORM PROJECT, SCHOOL FINANCE SYNOPSIS, *at* http://legisweb.state.wy.us/school00/synopsis/syniiie.htm (last visited May 29, 2003).

157. *Id.*

158. *Id.*

159. *See* WYOMING STATE LEGISLATURE, MODEL TRAINING MANUAL, TRAINING FOR THE REVISED COST BASED BLOCK GRANT (2002), *available at* http://legisweb.state.wy.us/2002/schoolfinance/map/trainman.pdf.

160. Taylor Grazing Act, 43 U.S.C. §§ 315-16 (2000) (establishing grazing districts and using a permitting system to manage livestock grazing in the districts; a portion of the fees received from the grazing permits are returned to the state where the grazing district is located). Wyoming law provides that the state treasurer shall distribute the money to the counties in which the public lands are located. WYO. STAT. ANN. § 9-4-401 (2003).

161. WYO. STAT. ANN. § 31-3-103 (2003). *See* WYOMING EDUCATIONAL REFORM PROJECT, SCHOOL FINANCE SYNOPSIS, *at* http://legisweb.state.wy.us/school00/synopsis/syniiie.htm (last visited June 8, 2003).

compares the amounts guaranteed to a district to other revenues available to that district. This comparison results in individual district entitlement amounts, i.e., payments from the state. It also determines if a district is a "recapture" district and subject to recapture payments. If local resources exceed the guarantee, the district is a recapture district and the excess amount is recaptured by the state and deposited into the foundation account.

If a district's guaranteed amount exceeds local resources, the state makes up the difference from the foundation account.[162] The states' premise is that both pupil equity and taxpayer equity are achieved through increased use of statewide taxes, reduced reliance on local property taxes, and maintenance of a locally elected board of trustees for some local discretionary spending authority.

The path to this model was difficult and there are some questions remaining as to the effectiveness of the new statutory scheme. It has taken three successive opinions from the Wyoming Supreme Court to achieve this constitutionally valid legislation. This litigation and the resulting foundation program are instructive as to the possible structure of claims that can be presented to a court in terms of taxpayer equity.

b. From Hinkle *to* Campbell: *Moving Through the Waves*

A 1980 decision by the Wyoming Supreme Court held that unequal funding among school districts was unconstitutional. In *Washakie County School District Number One v. Herschler*,[163] the court found the entire Wyoming school finance system unconstitutional. The court held that public education is a fundamental right under the Wyoming Constitution. In its instruction to the legislature, the court stated: "whatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole."[164] A 1971 opinion of the court had forewarned the legislature of this possibility. In response to a challenge brought before the court in *Sweetwater County Planning Committee for Organization of School Districts v. Hinkle*[165] regarding school district reorganization, the court spoke in terms of taxpayer equity when it stated:

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162. Phil Nicholas & Glenn Lang, *Major Legislation Enacted at the 2002 Special Session, in* WYO. LAW (2002).

163. Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert denied*, Hot Springs County Sch. Dist. No. 1 v. Washakie County Sch. Dist. No. 1, 449 U.S. 824, (1980).

164. *Washakie*, 606 P.2d at 336. This idea had been proposed even before the widespread school litigation. *See* COONS, CLUNE & SUGARMAN, *supra* note 4, at 340 ("[t]he quality of public education may not be a function of wealth other than the wealth of the state as a whole").

165. 491 P.2d 1234 (Wyo. 1971).

> We cannot avoid being aware that the matter before us has been and is difficult of solution because *a tax advantage is to be had be being in a school district where the assessed valuation is high.* If *ad valorem* taxes for school purposes were equalized throughout the state, as required by Art. 1, § 28, Wyoming Constitution, and by the equal protection clause of the Fourteenth Amendment to the United States Constitution, cases such as the one being dealt with would not arise. The time has come when *we can no longer ignore inequalities throughout our state in the matter of taxation for school purposes.*
>
> . . . .
>
> We see no manner in which *ad valorem* taxes for school purposes can be made equal and uniform unless it is done on a state-wide basis. In other words, all *property owners within the state should be required to pay the same total mill levy for school purposes.*[166]

In *Washakie*, three school districts, the board members of the districts as taxpayers and parents of children attending school, and several children attending schools in Washakie District challenged the Wyoming school finance system in a declaratory judgment lawsuit filed in 1978, which was dismissed by the trial court. On appeal, the Wyoming Supreme Court characterized the many claims brought by the plaintiffs as raising one essential issue: "[I]s the Wyoming system of financing public education in violation of the Wyoming Constitution?"[167]

The court first addressed the issue of taxpayer equity. The court noted that it had considered this question in *Hinkle* and had made suggestions to the legislature about how the problem might be addressed. The court then affirmed its conclusion reached in *Hinkle* that "as nearly as practicable, funds derived from *ad valorem* tax levies must be equally divided amongst the school districts of the entire state."[168] The filing of the *Washakie* case was viewed by the court as "breath[ing] new life into [the] controversy."[169] The court had noted when closing the *Hinkle* case that inequalities existing in the taxation for school purposes which could not be remedied until some adversely affected taxpayer maintained an action challenging the legislature's actions.[170] Although the court stated that it had been influenced by the *Serrano* decision, it distinguished the decision in *Hinkle* by reasoning that it was not necessary to find that the public school financing system resulted in invidious discrimination against students of poor persons, but rather it was sufficient to find that the Wyoming system resulted in deprivations to all children in some districts. As the court had noted in *Hinkle,* under these circumstances property taxes were not equalized and the state tax scheme violated section 28,

166. *Id.* at 1236-37 (emphasis added).

167. *Washakie*, 606 P.2d at 314.

168. *Id.* at 319.

169. *Id.* at 320.

170. *Id.* at 319 (citing *Hinkle*, 493 P.2d 1050, 1051 (1972)).

Article I of the Wyoming Constitution.[171] The court continued its analysis by examining other constitutional provisions and concluding that the *Washakie* decision would not rest upon the tax provision. Although *Washakie* was ultimately decided based upon the court's analysis of the state's education and equal protection clauses, it is clear that taxpayer equity was a major factor that influenced the court.

Additionally, the court examined the existing foundation program and the resulting apportionments and concluded that the program did not adequately equalize the education funds available to each district.[172] The evidence considered by the court demonstrated that districts with low property wealth consistently received less revenue per pupil than the property rich districts and that income available to some districts from sources other than foundation funds exacerbated the disparity. The court reasoned that this evidence supported a conclusion that the school finance system violated the state constitution by conditioning the right to an education upon wealth. The state's "equal protection" and education clauses were violated.

Section 34, Article I of the Wyoming Constitution provides that: "All laws of a general nature shall have a uniform operation," and has been construed by the court as equivalent to the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution.[173] The court concluded that the emphasis placed on education by the Wyoming Constitution led directly to the conclusion that the "education for the children of Wyoming is a matter of fundamental interest,"[174] and therefore required the state demonstrate that the foundation program satisfied the strict scrutiny test. The court's conclusion that education rises to a fundamental constitutional status was based upon the education clause which states: "The Legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade. . . ."[175] Although the court recognized that the state legislature had made considerable efforts in its attempt to construct a school equalization program, it warned "that until the equality of financing is achieved, there is no practicable method of achieving the equality of quality"[176] required by the state

171. *Hinkle*, 491 P.2d at 1237 n.2 (stating that the Wyoming Constitution provided that "[a]ll taxation should be equal and uniform.").

172. *See Brigham*, 606 P.2d at 329.

173. *Washakie*, 606 P.2d at 332 (citing Nehring v. Russell, 582 P.2d 67 (1978)).

174. *Id.* at 333.

175. WYO. CONST. art. VII, § 1. The court also cited Article 1, Section 23 which provides: "The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts." Article VII, Sections 1-14 were also discussed as providing a broad outline of the public education system.

176. *Washakie*, 606 P.2d at 334.

constitution and that the resources available to each district must be a function of the wealth of the state as a whole. The court also made it clear that it was not requiring that the per pupil expenditure be the same in each district.[177]

After the court's decision in *Washakie*, the constitution was amended in 1981 to reverse the amounts that the state and the counties were authorized to levy for educational purposes.[178] Thus, a twelve mill levy became a state resource for the foundation account and the county levy became six mill.[179] Additionally, in 1983 the Wyoming Legislature implemented a system, which it characterized as transitional while a study was being conducted. However, the Wyoming Legislature never implemented the permanent system.

In the early 1990s, the state's four largest school districts challenged the state's funding system. The original plaintiffs were later joined by a fifth school district and the Wyoming Education Association. The plaintiffs alleged that the state legislature had failed to address the funding inequities. In 1995, in *Campbell County School District v. State (Campbell I)*,[180] the Wyoming Supreme Court reversed the trial court's decision which partially upheld the state formula.[181] The Wyoming Supreme Court examined in detail the foundation program, as had the district court, but found that all elements of the program were unconstitutional and that differences in the funding and distribution formulas of the school finance system were not based on differences in the cost of education. The court concluded that wealthier districts were able to contribute more to the funds available per pupil than poorer districts, which led to educational resource inequities.[182] It stated further that "[a]n equal opportunity for a proper education necessarily contemplates the playing field will be leveled so each child has an equal chance for educational success."[183] In the court's view, the program failed to take into account wide differences in town wealth and lacked any significant equalizing state support. The 1983 program, therefore, violated the Wyoming Constitution's equal protection and education provisions.

The court wrote an exhaustive examination of the Wyoming Constitution's education provisions. In defining the legislature's obligation under the constitution, the court construed words that have been construed by other states, including "efficient" and "thorough" and

177. *Id.* at 335.
178. WYO. CONST art. XV, § 17 (county levy for support and maintenance of public schools).
179. WYO. STAT. ANN. § 21-13-303(a) (1987).
180. 907 P.2d 1238 (Wyo. 1995).
181. *Id.* at 1243.
182. *Id.* at 1270.
183. *Campbell I*, 907 P.2d at 1278.

concluded that the state's system of financing created wealth-based disparities in educational opportunity.[184]

The court considered the elements of an efficient and thorough education along with its discussion of the need for uniformity and ordered the legislature to: (1) design the best educational system by identifying the "proper" educational package each Wyoming student is entitled to have; (2) determine the cost of that educational package; and (3) take the necessary action to fund that package.[185] Educational opportunity under the foundation program was determined in large part by the natural resources in a district. The court was addressing both pupil and taxpayer equity by suggesting a shift in resources. This directive by the court has led some scholars commentators to describe the Wyoming decisions as a part of the adequacy shift and its resulting Foundation Plan as an adequacy model.[186] It seems more accurate to describe the litigation and court decision as equity driven and the remedy ordered as adequacy focused. The court first determined that equity was required and concluded that this could not be achieved without providing standards for an adequate education. The court relied on both education and equal protection clauses to develop this combination of requirements. The state was thus required to engage in adequacy studies to comply with the court order to develop an acceptable level of equitable education spending. Consequently, it may be more prudent to conduct the adequacy studies before commencing litigation so that the results can be used as evidence to support a claim of denial of equal education opportunity.

In 2001, the Wyoming Supreme Court held that its state legislature had created a school financing formula that complied with its constitutional obligations. On February 23, 2001, in its second *Campbell* decision, *State v. Campbell County School District (Campbell II)*,[187] the court accepted the Cost-Based Block Grant program and found the new education finance system capable of fulfilling the Wyo-

184. *Id.* at 1258-59. For a discussion of the use of "efficient" and "thorough" in state education clauses, see John Mill & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools,* 52 FLA. L. REV. 329, 344-45 (2000).

185. *Id.* at 1279.

186. The methodology was developed by school finance scholars James Guthrie, of Vanderbilt University, and Richard Rothstein, of the Economic Policy Institute. *See* INSTITUTE FOR WISCONSIN'S FUTURE, FUNDING OUR FUTURE: AN ADEQUACY MODEL FOR WISCONSIN viii, *at* http://www.wisconsinsfuture.org/reports/Adequacy_report6_02.pdf (2002). *See also* MICHAEL A. REBELL, EDUCATIONAL ADEQUACY, DEMOCRACY, AND THE COURTS IN ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL (T. Ready et al. eds., 2002).

187. 19 P.3d 518 (Wyo. 2001).

ming Constitution's guarantee of an education.[188] It also, however, found certain provisions of the model unconstitutional and ruled that the legislature must remedy these unconstitutional provisions on or before July 1, 2002. This included a determination that the statutory scheme failed to change the financing of school capital construction from local wealth to the wealth of the state as a whole and failed to provide "constitutionally adequate facilities to school districts that provide an equal opportunity for a quality education."[189] *State v. Campbell County School District (Campbell III)*,[190] a decision on rehearing, clarified certain components of the court's earlier decision in *Campbell II* and ordered:

> As the school districts and the legislature combine their efforts to implement the legislative plan for capital construction, these fundamental precepts apply. First, the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards. Second, the Legislature is in control of the ultimate amount of spending as it exercises its responsibility of review and oversight of specific projects proposed by local school districts. Third, local school districts may supply revenue in excess of Legislative spending. Lastly, local bonded indebtedness is no longer required.[191]

Although the taxpayer and pupil equity arguments used in Wyoming can be helpful to rural school districts because a significant portion of Wyoming's population is rural, it should be recognized that some small and rural school districts opposed the school finance reorganization in Wyoming.[192] This was due in part to a controversy that exists in school finance litigation. Some rural and small school districts as well as members of legislatures believe that small schools and small school districts are entitled to additional funding because they suffer diseconomies of scale. In many rural districts, this may be true. What must be kept in mind is that the data to substantiate this belief must be presented to the court. As the Wyoming court has recognized, there can be different levels of funding provided to districts as long as the disparities are cost-justified. Although the *Campbell* decision is often cited as an adequacy case, it is clear that the prior decisions in *Washakie* and *Hinkle* resolved questions of equity which were the basis for the *Campbell* decision's adequacy remedy.

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188. Both the Wyoming Department of Education and the Wyoming Legislature have created websites with information explaining the new system. The respective sites are available at http://www.k12.wy.us/FINANCE/district_funding.htm and http://legisweb.state.wy.us/schmenu.htm.

189. 19 P.3d at 559.

190. 32 P.3d 325 (Wyo. 2001).

191. *Id.* at 337.

192. 907 P.2d at 1243, 1251 (stating that twenty-three "small" school districts intervened as defendants).

3. Applicability to Other States

Although as the Vermont Supreme Court noted, each state's constitutional evolution is unique, the approach taken by the Vermont and Wyoming courts can be helpful in other states. A thorough and searching inquiry into the historical and legal origins of the inclusion of the state educational clause in the constitution in conjunction with the equal protection clause, and recognition of the fact that education is specifically mentioned while other benefits are not, could lead to successful arguments even in states that have previously rejected constitutional claims.[193] *Brigham* demonstrates that the lawyers must take time to painstakingly demonstrate the grievance that their plaintiffs suffer and link that suffering to both the education and equal protection clauses. Like Vermont, in many other states, education is "the *only* governmental service considered worthy of constitutional status."[194] In addition, although the language of each state's education and equal protection clauses may be different, there are similarities in the language and the historical basis for enactment that can be used to find an existing constitutional right to education and an obligation of equal education opportunity. The Vermont court noted that similar obligations had been found in Kentucky, Tennessee, and Texas. In *Rose v. Council for Better Education, Inc.*,[195] the Kentucky Supreme Court found that educational opportunities were required to be "substantially uniform throughout the state" based upon an education clause that provided: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."[196] In so holding, it affirmed the trial court's acceptance of the plaintiffs' arguments that the Kentucky school finance system violated the equal protection and education provisions of the Kentucky Constitution. In *Tennessee Small School System v. McWherter*,[197] the State Supreme Court held that the state education financing system was required to provide "substantially equal educational opportunities" based upon its education clause which provides:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational in-

193. *See generally* John Dayton, *An Anatomy of School Funding Litigation*, 77 EDUC. L. REP. 627, 641 (1992) (discussing the court's interpretation of state clauses); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993).

194. Brigham v. State, 692 A.2d 384 (Vt. 1997).

195. 790 S.W.2d 186, 211 (Ky. 1989).

196. KY. CONST § 183.

197. 851 S.W.2d 139 (Tenn. 1993).

> stitutions, including public institutions of higher learning, as it determines.[198]

If the use of equity-based theory could have been considered no longer viable, Tennessee's reliance upon the state's equal protection clause revived it. The court held that Tennessee's reliance on local sales and property taxes violated the state's equal protection clause because the finance system was irrational. In *Edgewood Independent School District v. Kirby*,[199] the Texas Supreme Court relied upon the state's education clause, but used equity language when it found a requirement for "substantially equal access to similar revenues per pupil" in the education clause which provides:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[200]

The populations in Vermont and Wyoming are overwhelmingly white and therefore racially homogenous,[201] however, there have been favorable equity decisions in states that have significant rural minority student populations and where the plaintiffs were seeking relief for districts with minority populations.[202] For example, in *Kasayulie v. State*,[203] named for plaintiff Willie Kasayulie of the Akiachak Native Community in Alaska, plaintiffs in Alaska filed a lawsuit that included "adequacy" and "equity" claims. The plaintiffs alleged that the state school finance system for funding facilities projects discriminated against rural Native American students in violation of the state's education and equal protection clause. The Alaska Superior Court agreed that the system discriminated against Native Americans and held that the method of funding facilities was unconstitutional

198. TENN. CONST art. XI, § 12.

199. 777 S.W.2d 391, 397 (Tex. 1989).

200. TEX. CONST. art. VII, § 1.

201. *See* U.S. CENSUS BUREAU, STATE POPULATION RANKINGS SUMMARY: 1995 AND 2025, *available at* http://www.census.gov/population/www/projections/9525rank.html (last visited June 8, 2003). *See also* Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 647 (2001).

202. The racial composition of the plaintiff class may have some effect on school finance litigation as well as the implementation of a favorable decision. *See generally* Baker & Green *supra* note 4; Erwin Chemerinsky, The *Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003); Dyson, *supra* note 4; Morgan, *supra* note 4; James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999) (reviewing the history of modern school finance litigation, and suggesting that racial considerations may still drive judicial and legislative resolutions in many of these cases).

203. Kasayulie v. State, No. 3AN 97-3782CTV, slip op. at 8 (Alaska Sept. 1, 1999).

since education is a fundamental right in Alaska.[204] In *Lake View School District Number 25 of Phillips County v. Huckabee*,[205] the Arkansas Supreme Court found the state's system of school finance was both inequitable and inadequate based upon education and equal protection clauses of the Arkansas Constitution. Lake View is a one-school rural district. All of its students are African-American. The court emphasized the overlap between equity and adequacy and found that "[d]eficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality."[206]

Much of the criticism of the use of equity-based theories in school finance litigation results from a focus on remedies. Some courts that rejected plaintiffs' claims did so because plaintiffs failed to show a link between unequal funding and denial of an adequate education,[207] or convince the courts that the state constitution recognizes education as a constitutional right in a way that other benefits are not recognized.[208] Some courts believed either that it was too difficult to determine an appropriate remedy or that if a remedy was ordered, it could apply to many government benefits. Additionally, favorable court decisions have sometimes met strong opposition in the implementation stage because there has been a failure to agree upon what is needed for an adequate education for all children.[209] This criticism empha-

204. *Id.*; *see generally Rural School Construction and Maintenance Bond Package Offered*, TribalNews.com, *at* http://www.tribalnews.com/lal/3-1_construction.htm (Feb. 28, 2002).

205. 91 S.W.3d 472 (Ark. 2002), *cert. denied*, Wilson v. Huckabee, 123 S.Ct. 2097 (2003).

206. *Id.* at 496.

207. *See, e.g.*, Gould v. Orr, 244 Neb. 163, 169, 506 N.W.2d 349, 353 (1993) (dismissing plaintiff's petition without leave to amend because "no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action" and where plaintiffs alleged that unequal funding equals inadequate education); Levittown v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982) (acknowledging per-pupil spending discrepancies, but concluding such discrepancies alone did not rise to a constitutional violation, leaving open the possibility of a constitutional violation if "gross and glaring" inadequacy could be shown).

208. *See generally* Olsen v. State, 554 P.2d 139, 144-45 (Or. 1976) (expressing fear that a holding that education is a fundamental "interest" would apply to the state constitution's liquor by the drink provision); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 404-09 (2000) (citing Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983) (expressing concern about creating a fundamental rights precedent that would apply to constitutional provisions on parking and loan financing)).

209. Michael Rebell, *Financing Our Future Education Improvements for the 21st Century, Panel Three Commentary — Rodriguez Revisited: An Optimist's View*, 1998 ANN. SURV. AM. L. 289, 296 (1998) (noting that equity-based claims lost their plausibility when they went to the remedial stage).

sizes the need to include both equity-based and adequacy-based claims in litigation.[210]

In some states it may seem futile for rural districts to pursue litigation, either because there is an unfavorable court opinion in the state, litigation exists but does not include rural districts, or a favorable judgment exists but the political branches have failed to provide appropriate remedies by demonstrating that the rural districts are suffering from the same inequities as successful urban district plaintiffs.[211] In the face of unfavorable court opinions, equity-based arguments that have succeeded in the courts in some states may be persuasive arguments in the political process by directing arguments to the legislature or the governor which can lead to a restructuring of the school finance formula. Where litigation may seem futile or ill-advised, convincing legislatures of the existing inequities to rural students and taxpayers and disparities in educational opportunity may be the first step to triggering equitable funding.[212] Additionally, rural districts may be able to benefit from existing court ordered remedies by demonstrating that the rural districts are suffering from the same inequities as successful urban district plaintiffs.[213] If lawsuits have been filed and failed using adequacy arguments but not including equity arguments because the challengers were convinced that the "third wave" required adequacy claims, it may, nevertheless, be possible to frame claims around equal protection clauses or use equity-based language in connection with education clause claims.[214]

If there is no court order or there is a court order holding that there is no fundamental right to an education, a legislature could be convinced that it can enact an equitable finance system that will survive a constitutional challenge. Presumably, if faced with a challenge to such a system, courts in these states will find that it satisfies the ra-

210. *See* Rebell *supra* note 87, at 704-05 (stating that "[i]deally, a remedy for a fiscal equity case would be based on both minimum adequacy and egalitarian concepts").

211. *See generally* Frank Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551 (1996).

212. Legislatures will be influenced by other factors such as economic and political conditions existing in the state. *See generally* Patt, *supra* note 49 (discussing political factors, including public opinion, as influencing successes in school finance reform).

213. *See, e.g.*, Keaveney v. N.J. Dept. of Educ., EDU 2637-00, 2000 N.J. AGEN LEXIS 814 (2000) (on file with the Nebraska College of Law Library). Seventeen rural school districts met the first threshold to receive additional funding as a "special needs" district as had 30 urban districts in *Abbott v. Burke* litigation.

214. *See generally* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (categorizing education clauses in relation to their use of equity language).

tional basis test.[215] Equity-based claims can succeed if there is either a favorable determination by the courts or acceptance of the existence of the inequalities by the state legislature. Recent school reform that has been initiated without favorable court opinions includes a 1994 Michigan school financing ballot initiative which increased sales taxes and reduced property tax as the primary method of obtaining public school revenue,[216] with funding provided to school districts on a per-pupil basis.[217] After an unsuccessful court challenge[218] school finance reform was also initiated in Maryland relying on both equity and adequacy principles.[219]

Plaintiffs in lawsuits that include rural school districts continue to include equity-based theories. A lawsuit was filed in Iowa in April 2002 alleging that the state school finance system violates both the State equal protection and education clauses.[220] The *Williams v. State of California*[221] lawsuit also alleges violations of the State's equal protection and education clauses. The *Williams* complaint stresses principles of equity as it opens with the following paragraph:

> Tens of thousands of children attending public schools located throughout the State of California are being deprived of basic educational opportunities available to more privileged children attending the majority of the State's public schools. State law requires students to attend school. Yet, all too many California school children must go to schools that shock the conscience. Those

215. *See generally* L. Darnell Weeden, *Creating Race-Neutral Diversity in Federal Procurement in a Post-Adarand World*, 23 WHITTIER L. REV. 951, 976 (2002) ("Although a state is not required to remedy the disparities in educational funding, it may do so . . . using the rational basis test because economic equalization based on a race-neutral factor, such as the disparity in property tax values, unlike race, is not a suspect classification.")

216. MICH. CONST. art. 9, §§ 8, 11.

217. *See generally* Lundberg, *supra* note 21, at 1138-39 (arguing that the Michigan system is not viewed as satisfactory and that rural districts are not faring well under per-pupil distribution system) (citing Alex Rodriguez, *What Reform Taught Michigan Series: School Funding Reform*, CHI. SUN-TIMES, Mar. 24, 1997, at 6)); Leon N. Mayer, *Durant v. State of Michigan: The Interaction of the Headlee Amendment to the Michigan Constitution and Funding for Special Education Provided by the State to Local School Districts*, 1998 DET. C.L. MICH. ST. U. L. REV. 893 (1998).

218. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983).

219. *See* MD. CODE ANN., §§ 5-201, 5-202 (2003). *See generally* NATIONAL EDUCATION ASSOCIATION, SCHOOL FUNDING ADEQUACY — WHAT IT COSTS TO DO THE JOB RIGHT, *at* http://www.nea.org/neatoday/0209/news18.html (2002).

220. Petition for Declarative Judgment and Injunctive Relief, Coalition for a Common Cents Solution v. State, (Iowa Dist. Ct. Warren Co. 2002) (on file with the Nebraska College of Law Library). *See* Matthew M. Craft, Note, *Lost and Found: The Unequal Distribution of Local Option Sales Tax Revenue Among Iowa Schools*, 88 IOWA L. REV. 199 (2002) (discussing the relevance of the Iowa lawsuit to rural districts).

221. No. 312 236 (Cal. Super. Ct., S.F. County, filed Nov. 14, 2000) (on file with the Nebraska College of Law Library). *See* Meredith May, *ACLU Sues State Over Public School Conditions*, S.F. CHRONICLE, May 18, 2000, at A3.

> schools lack the bare essentials required of a free and common school education that the majority of students throughout the State enjoy: trained teachers, necessary educational supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards. Students must therefore attempt to learn without books and sometimes without any teachers, and in schools that lack functioning heating or air conditioning systems, that lack sufficient numbers of functioning toilets, and that are infested with vermin, including rats, mice, and cockroaches. These appalling conditions in California public schools represent extreme departures from accepted educational standards and yet they have persisted for years and have worsened over time. Students who are forced to attend schools with these conditions are deprived of essential educational opportunities to learn. Plaintiffs bring this suit in an effort to ensure that their schools meet basic minimal educational norms.[222]

B. Federal Solutions

Even in the early stages of school finance litigation, some scholars recognized the need to rethink the system of school finance that relied too heavily upon local property taxes. As Professor Annette Johnson put it in 1979, "[i]f a state without a previous history of public education financing were now proposing the initiation of a plan, it is highly unlikely that the system of dual responsibility for school financing . . . would be adopted."[223] Since the subsequent decades of litigation have led to various remedies which many have deemed unsuccessful in eliminating the inequitable disparities,[224] since there are disparities among the several states as well as within, and since the United States Supreme Court has emphasized the importance of education to the country, this discussion of possibilities for achieving equity in rural schools finance would not be complete without some consideration of the role of the federal government.

In *Brown v. Board of Education*, the Court stated that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[225] Even in *Rodriguez* when the Court failed to find a violation of the federal equal protection clause, Justice Powell declared that "the need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity."[226] While Justice Powell probably had in mind the role of state govern-

222. Complaint for Injunctive and Declaratory Relief at 1, Williams v. State of California, No. 312236 (Cal. Super. Ct., S.F. County, filed Nov. 14, 2000) (on file with the Nebraska College of Law Library).

223. Johnson, *supra* note 6, at 327-28 (footnote omitted).

224. *See, e.g.*, William E. Thro, *Commentary: Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 28 (2003).

225. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

226. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

ment, his words are equally applicable to the question of the role of the federal government in improving finance systems for public school education. It is clear that the federal government has a role in public school education, but it is unclear how that role should be defined.

There is a need for an increased role of the federal government in public school financing. Perhaps that role is with the federal courts in scrutinizing state finance systems, or perhaps it is with the political branches in the provision of a federal funding system, or perhaps both. This part of the article briefly considers how the role of the federal government should be considered when developing a school finance strategy by exploring three possible areas: (1) Federal Equal Protections claims; (2) Title VI of the Civil Rights Act of 1964; and (3) other federal legislation.

1. Federal Equal Protection

Since the *Rodriguez* decision, most courts and litigants have concluded that alleging a violation of the Fourteenth Amendment of the United States Constitution as a ground for invalidating state systems of school finance is futile. The plaintiffs in *Brigham* accepted the trial court's rejection of their federal equal protection claims.[227] The Wyoming Supreme Court noted that *Rodriguez* made it clear that the issue of education finance is left to the states.[228] It is not surprising that many would conclude that there is no longer an equal protection claim that can be brought before the federal courts.[229] That assumption is based upon the *Rodriguez* holding that education is not a fundamental right. However, as noted above, there are two other claims available to prove that a state has violated the Equal Protection Clause: discrimination against a suspect class and failure of the state to meet the rational basis test. In addition, the Supreme Court has indicated that under some circumstances it may be possible to establish the existence of a fundamental right in connection with a challenge of a state financing system.[230]

First, it may be possible to restructure the class to meet the definition of a suspect class. According to *Rodriguez,* the challengers of a state financing system would need to establish that the state system

227. Brigham v. State, 692 A.2d 384, 387 (1997) (nothing that a joint appeal was filed expect for the dismissal of the Federal Equal Protection claims).

228. State v. Campbell County Sch. Dist. ("Campbell III"), 32 P.3d 325, 338-39 (Wyo. 2001).

229. *See generally* Gary A. Allison, *School Vouchers: The Educational Silver Bullet, or an Ideological Blank Round?*, 38 TUL. L. REV. 329, 359 (2002); Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 16 (2002); Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 548 (1999).

230. Papasan v. Allain, 478 U.S. 265, 266 (1986). *See infra* text accompanying notes 233-235.

disadvantages a definable class of the "poor" and that there was an absolute deprivation of education.[231] The Wyoming litigation resulted in the court focusing on districts, rather than persons. There, the litigants were able to show that there was a difference in the education provided to children based upon the wealth of districts, rather than the wealth of persons. The deprivation could perhaps be demonstrated by referring to the standards that are set by the state to measure an "adequate" education. If the children in a property poor district consistently fail to meet the state standards, they are being deprived of the entitlement that the state has defined.

Second, an equal protection violation that is not based upon deprivation of a fundamental right or a suspect class can still be successful if the state's finance system fails the rational basis test. The Vermont Supreme Court found that its state system failed both the strict scrutiny and rational basis test.[232] A state system could be challenged on the basis that disparate treatment received under a finance system does not bear a rational relationship to a legitimate state interest.

Finally, a claim can be structured to articulate a fundamental interest. Recently, equal protection claims have at least survived a motion to dismiss in a school finance case filed in Kansas. In *Robinson v. Kansas*,[233] a lawsuit was filed alleging that the Kansas school finance system, which allocated disproportionately large amounts of state funding to low enrollment districts, and authorized districts to adopt local option budgets to provide additional school funding, violated their federal statutory and constitutional rights. The suit was brought on behalf of minority, foreign, and disabled students attending large, non-affluent school districts, and included a claim that the system violated their rights under the Equal Protection Clause of the Fourteenth Amendment. In rejecting the state's motion for dismissal of this claim, the court referred to the Supreme Court's opinion in *Papasan v. Allain*,[234] which held that the unequal distribution of state resources available for education violated the Equal Protection Clause if such differential treatment was not rationally related to a legitimate state interest.[235] The United States Supreme Court stated in *Papasan* that it had "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a

231. *See Rodriguez*, 411 U.S. at 20-23, 25 (noting that in its prior cases, individuals had proven that they sustained an absolute deprivation of a desired benefit, however, in *Rodriguez*, there was no evidence of an absolute deprivation of education).

232. *See* Brigham v. State, 692 A.2d 384, 395-396 (1997).

233. 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd* 295 F.3d 1183 (10th Cir. 2002).

234. 478 U.S. 265 (1986).

235. *Robinson*, 117 F. Supp. 2d at 1147.

statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[236]

2. Title VI

Title VI of the Civil Rights Act of 1964, prohibits federal fund recipients from discriminating on the basis of race, color, or national origin.[237] Challenges to state public school funding schemes under Title VI are possible because states accept federal money to support public schools. Plaintiffs in a number of states have successfully included Title VI challenges in their lawsuits.[238] The claims are similar to claims of inequity under state law and generally focus on disparities in inputs such as funds for textbooks, teachers, and facilities. Title VI claims may be of particular help to rural school districts that include a high percentage of minority students.[239] For example, in *Powell v. Ridge*,[240] the plaintiffs alleged that Pennsylvania's education funding formula denied an equal educational opportunity to minority students because it gave less revenue per child to students in school districts with high proportions of minority students than to students in similarly situated, predominantly white school districts. The Third Circuit held that the plaintiffs had stated a claim under Title VI and its implementing regulations. The court reversed the trial court's dismissal of the plaintiff's claim, holding that the Title VI disparate impact claim could go forward and noting that the plaintiffs will have to prove:

> (1) that less educational funding is provided by the Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students, (2) that the school districts attended by most non-white students in Pennsylvania receive less total educational funding than do the school districts attended by most white students, (3) that these disparities in funding are produced by the Commonwealth's funding formula, and (4) that the funding disparities injure nonwhite students by limiting their educational opportunities.[241]

The Alaska lawsuit filed in *Kasayulie v. State*[242] also included a Title VI claim. In granting plaintiffs' motion for partial summary

236. *Papasan*, 478 U.S. at 285. *See generally* Baker & Green, *supra* note 4.
237. Civil Rights Act of 1964 § 601, Pub. L. 88-352; 42 U.S.C. § 2000d (2003).
238. *See, e.g.*, Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (challenging Philadelphia school system financing), *cert. denied*, 528 U.S. 1046 (1999); Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kan. 2000); Caesar v. Pataki, 2000 WL 1154318 (S.D.N.Y. Aug. 14, 2000); Kasayulie v. State, No. SAN 97-3782CTV, slip op. at 11 (Alaska Sup. Ct. 1999); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, (N.Y. Sup. Ct. 2001).
239. *See generally* Dyson, *supra* note 4; Morgan, *supra* note 4.
240. 189 F.3d 387 (3d Cir. 1999).
241. *Powell*, 189 F.3d at 395 (footnote omitted).
242. Kasayulie v. State, No. 3AN 97-3782CTV, slip op. at 8 (Alaska Sup. Ct. Sept. 1, 1999).

judgment, Judge John Reese of the Anchorage Superior Court ruled that a disparity existed between rural Native schools and urban white schools and that rural schools and rural school children were routinely denied equal access to opportunities in education in violation of the implementing regulations of Title VI.[243]

These successes became of questionable value when the United States Supreme Court, in *Alexander v. Sandoval*,[244] ruled that the Title VI regulation establishing a "disparate-impact" standard of discrimination does not provide a "private right of action."[245] This 2001 decision has called into question the viability of future Title VI claims. However, the Department of Education can continue to find violations of its regulations[246] and private claims based upon Title VI violations may be possible under 42 U.S.C. § 1983.[247] Section 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[248]

The lower courts are divided on the availability of section 1983 claims.[249]

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243. *See supra* text accompanying notes 202-203.

244. 532 U.S. 275 (2001) (challenging Alabama's English-only driver's license exam based on the implementing regulations of Title VI).

245. *Id.* at 291-92.

246. The DOE regulations forbid funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (2002).

247. *See generally* Dyson *supra* note 4; Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); Morgan, *supra* note 4; Kevin G. Welner, *Tracking in an Era of Standards: Low-Expectation Classes Meet High- Expectation Laws*, 28 HASTINGS CONST. L.Q. 699 (2001); Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1016 (2001); Derek Black, Comment, *Picking up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356 (2002).

248. 42 U.S.C. § 1983 (2002).

249. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 788 (3d Cir. 2001) ("EPA's disparate impact regulations cannot create a federal right enforceable through section 1983."); *rev'g* 145 F. Supp. 2d 505 (D. N.J. 2001) (holding that private parties may rely on 42 U.S.C. § 1983 to enforce the federal rights in EPA's Title VI § 602 disparate impact implementing regulations); Loschiavo v. City of Dearborn, 33 F.3d 548, 553 (6th Cir. 1994) (allowing a § 1983 suit to enforce rights under FCC regulations); White v. Engler, 188 F. Supp. 2d 730 (E.D.

Title VI claims are also pending in Kansas and California. In *Robinson v. Kansas*,[250] a decision following *Sandoval*, the Tenth Circuit affirmed the district court's holding and noted that the plaintiffs were willing to amend their complaint to bring their Title VI claims under 42 U.S.C. § 1983 to enforce section 602 regulations. The *Robinson* court stated that the *Sandoval* "decision does not bar *all* claims to enforce such regulations, but only disparate impact claims brought by private parties directly under Title VI. Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations."[251] Thus, instead of a direct claim under Title VI, rural plaintiffs could bring a private action under section 1983 to enforce rights contained in the Title VI disparate impact regulations adopted by the United States Department of Education.

The class action lawsuit, *Williams v. California*,[252] alleged that the failure of California's public schools to provide necessary learning tools had a racially disparate impact in violation of the equal protection and due process clauses of the California Constitution and Title VI of the Civil Rights Act of 1964 and its implementing regulations.[253] The plaintiffs in *Williams* include primarily low-income children, immigrant children, and children of color.

Although neither of the cases specifically alleged that they are directed at reforms in rural districts, the Kansas and California decisions will have a major impact on rural students. Nearly half the schools in Kansas are rural[254] and in California, the percentage of students enrolled in rural schools who are minorities is 41% in comparison to the national percentage of 18.6%.[255] The Rural Trust has concluded that the need for attention to California rural schools is critical.[256]

3. *Additional Legislation*

The need to continue pursuing federal relief is particularly important in rural states that have adverse state supreme court opinions

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Mich. 2001) (holding that plaintiffs may bring a § 1983 action to enforce Title VI regulations).

250. 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'g*, 295 F.3d 1183 (10th Cir. 2002).

251. *See Robinson*, 295 F.3d at 1187 (footnotes omitted).

252. No. 312 236 (Cal. Super. Ct., S.F. County, filed Nov. 14, 2000) (on file with the University of Nebraska College of Law). *See* Meredith May, *ACLU Sues State over Public School Conditions*, S.F. CHRONICLE, May 18, 2000, at A3.

253. Complaint for Injunctive and Declaratory Relief at 46-49, Williams v. California, No. 312 236 (Cal. Super. Ct., S.F. County, filed Nov. 14, 2000) (on file with the University of Nebraska College of Law Library).

254. Beeson & Strange, *supra* note 34, at 40.

255. *Id.* at 29.

256. *Id.*

interpreting the education and equal protection clauses of the state constitution. Some scholars have suggested that the school finance reform is now in its fourth wave which may rely more heavily on federal relief.[257] New efforts are needed in this area and it is apparent that these efforts must include the federal government. In addition to pursuing federal litigation strategies, actions should be considered that are aimed at convincing the political branches of the federal government that it is time for a new way of thinking about financing public school education. The Supreme Court in *Rodriguez* recognized that even though the Texas plaintiffs had not proved an equal protection claim, there did exist a need for "innovative thinking as to public education, its methods, and its funding . . . to assure both a higher level of quality and greater uniformity of opportunity."[258] Arguably, the No Child Left Behind Act of 2001 ("NCLB"), which was signed into law on January 8, 2002, is meant to address the need for a "high quality education,"[259] but its provision for an expanded role of the federal government in public school education[260] fails to address the funding issue of a "greater uniformity of opportunity." NCLB states its purpose as follows: "The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[261] In part, to fulfill this purpose, the Act requires states to develop a plan that ensures all teachers are highly qualified by the 2005-06 school

257. For discussions of Title VI as a fourth wave strategy, see Dyson, *supra* note 4, at 18-19; Erving, *supra* note 77; Morgan, *supra* note 4, at 173; Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and The Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998).

258. *Rodriguez*, 411 U.S. at 58.

259. Pub. L. No. 107-110, Stat. 1469, 20 U.S.C. §§ 6301 (2002). *See also* U.S. DEPT. OF EDUC., INSIDE NO CHILD LEFT BEHIND, *at* http://www.ed.gov/about/offices/list/oese/index.html (last visited October 12, 2003) ("The Act is the most sweeping reform of the Elementary and Secondary Education Act (ESEA) since ESEA was enacted in 1965. It redefines the federal role in K-12 education and will help close the achievement gap between disadvantaged and minority students and their peers. It is based on four basic principles: stronger accountability for results, increased flexibility and local control, expanded options for parents, and an emphasis on teaching methods that have been proven to work.") (on file with the author). ESEA, which was first enacted in 1965, is the principal federal law affecting K-12 education. The No Child Left Behind Act is the most recent reauthorization of the ESEA. ESEA Title I provides financial assistance through state educational agencies (SEAs) to local educational agencies (LEAs) and schools with high numbers or percentages of poor children.

260. *See generally*, RHONDA E. SCHNEIDER, ESQ., MASS. DEPT. OF EDUC., THE STATE AND FEDERAL ROLES IN MASSACHUSETTS PUBLIC SCHOOLS (2003); Ronald D. Wenkart, *Commentary: The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. L. REP. 589 (May 8, 2003).

261. 20 U.S.C. § 6301.

year.[262] State educational systems are accountable to the federal government pursuant to the NCLB, if they contain public schools that receive funding under Title I of the Elementary and Secondary Education Act.[263] The expanded role of the federal government in public education was not accompanied by the necessary increases in funding. Appropriations for increased funding under NCBL were significantly reduced in part because of increased demands for funding related to terrorism concerns.[264] The imposition of new requirements without funding places rural schools in even more vulnerable positions when they exist in states that do not have equitable funding systems.

As one scholar has stated, NCLB "is an important goal that will be difficult to realize when educational funding policies of a state lead to the distribution of financial and educational resources in an inequitable . . . fashion."[265] Legislation such as Title VI, Part B of NCLB, Rural Education Initiatives,[266] along with appropriate funding, could provide rural school districts with the funding needed for research to determine the appropriate level of resources for rural schools as well as direct funding for the schools. This part of NCLB establishes a Rural Education Achievement Program ("REAP") which is aimed at small and rural schools and authorizes local education agencies[267] to use program funds for: (1) teacher recruitment and retention; (2) professional development; (3) educational technology; (4) parental involvement activities; (5) activities authorized under Safe and Drug-Free Schools; (6) activities authorized under Part A of Title I for high poverty schools; and (7) activities authorized under Title III for language instruction for limited English proficient and immigrant students.[268] The goals expressed in NCLB accompanied by significant additional funding to meet its mandates could be used to help achieve equitable funding for rural schools. NCLB could also serve as the model for other legislation aimed at providing equal education opportunity within and between states.

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262. *Id.* at § 6319.

263. *Id.* at §§ 6301-6578.

264. *See generally* Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Education Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 67 (2002).

265. Dyson, *supra* note 4, at 17-18.

266. 20 U.S.C. § 7341 (2002) (originally enacted as part of the Omnibus Consolidated Appropriation Act for fiscal year 2001 and reauthorized under NCLB).

267. A local education agency (LEA) is a public board of education or other public authority within a State which maintains administrative control of public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state. *See supra* note 258.

268. *See* NATIONAL EDUCATION ASSOCIATION, CONGRESSIONAL ISSUES OVERVIEW: RURAL EDUCATION, *at* http://www.nea.org/rural/l acoverview-rural.html (2002).

V. CONCLUSION

This review of equity and adequacy theories as a part of rural school finance strategy suggests that the two litigation theories are interrelated so much that they do not provide such distinct waves of litigation as some have argued. The equity issue can be viewed as the articulation of the duties and obligations imposed by state constitutions. While the adequacy issue focuses on the appropriate remedies that the legislature will need to enact to provide an equitable system, the likelihood of success for other rural plaintiffs seems to be best when reliance is placed on both the state equal protection and education clauses. The complexities of implementing remedies suggest that a move toward federal constitutional claims and statutory solutions should also be pursued. Experience shows that litigation may not be the most productive avenue for reform in all situations. School reform strategies must include a consideration of the role of the political branches of government both on the state and federal levels in the pursuit for equity in education for rural schools.